Supreme Court, U.S.
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No. 03-

# In The Supreme Court of the United States

**JENNIFER M. GRANHOLM, Governor; et al.,**

**Petitioners,**

**and**

**MICHIGAN BEER AND WINE WHOLESALERS ASSOCIATION,**

**Respondent,**

**v.**

**ELEANOR HEALD, et al.,**

**Respondents.**

***On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit***

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Under state law, the Michigan Liquor Control Commission generally bans out-of-state direct shipment of alcoholic liquor to consumers' doorsteps, but permits in-state licensed wineries to direct ship to consumers, and out-of-state wineries to import through in-state licensed wholesalers. Out-of-state wineries may also petition the State Liquor Control Commission for an order permitting them to ship wine directly to consumers in the State. Any denial of such a request may be appealed through the State court system. Section 2 of the 21st Amendment to the United States Constitution expressly prohibits importation of alcoholic beverages into any state for delivery or use, in violation of the laws of the State. The Court of Appeals declared Michigan's alcoholic liquor importation law facially unconstitutional in violation of the Commerce Clause. The question presented is:

Does Michigan's regulation of the importation of beverage alcohol under the 21st Amendment facially violate the Commerce Clause when it permits in-state licensed wineries to directly ship alcohol to consumers, but requires out-of-state wineries to import its products through licensed in-state wholesalers and to sell its products through licensed retailers or request permission of the Liquor Control Commission to bypass this distribution system and ship directly to consumers?

## PARTIES TO THE PROCEEDINGS

Petitioners, Defendants-Appellees below, are State of Michigan officials including the Governor, the Michigan Attorney General, and the Chair of the Liquor Control Commission. The current holders of those offices have been automatically substituted as parties for the former office holders pursuant to Sup. Ct. R. 35.3.

Respondent Michigan Beer and Wine Wholesalers Association intervened as Defendant-Appellee below. Its interests are not adverse to the interests of Petitioners. Petitioners are informed that the Association intends to file a separate Petition for a Writ of Certiorari.

Respondents, Plaintiffs-Appellants below, include Eleanor Heald, Ray Heald, John Arundel, Karen Brown, Richard Brown, Bonnie McMinn, Gregory Stein, Michelle Morlan, William Horwath, Margaret Christina, Robert Christina, Trisha Hopkins, Jim Hopkins and Domaine Alfred, Inc. The thirteen individual Respondents are Michigan residents. Respondent, Domaine Alfred, Inc., is a California winery. These parties will be referred to collectively in the Petition as Respondents.



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## OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported at 342 F.3d 517 (6th Cir. 2003). App. 1a-18a. The opinion of the District Court is unreported as is the judgment and its order denying reconsideration. App. 25a-39a.

## JURISDICTION

The Court of Appeals' judgment was entered on August 28, 2003. App. 19a-20a. The court denied rehearing en banc on November 4, 2003. App. 21a-22a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XXI provides, in pertinent part:

> Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

The Commerce Clause, U.S. Const. art. 1, § 8, cl. 3, provides, in pertinent part:

> The Congress shall have power . . .
> * * *
> To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

The pertinent federal statute is the Webb-Kenyon Act, 27 U.S.C. § 122. App. 44a.

The applicable Michigan statutes, and administrative rules, are Const. 1963, art. 4, § 40, Michigan Compiled Laws (MCL) §§ 436.1109; 1111; 1113; 1203; 1537; 1603; 1605; 1607; 1701; 1719; 1801; 1903; 1909; and Michigan Administrative Code Rules 436.1515; 1719. App. 45a-71a.

## STATEMENT

The Michigan Constitution provides that "the legislature may by law establish a liquor control commission which, subject to statutory limitations, shall exercise complete control of the alcoholic beverage traffic within this State, including the retail sales thereof." Const. 1963, art. 4, § 40.

Consistent with its powers under U.S. Const. amend. XXI and the Michigan Constitution and statutes, the Michigan Liquor Control Commission, like most states, has adopted a three-tier regulatory system. It requires that consumers purchase and receive alcoholic beverages from licensed in-state retailers (3rd tier); retailers purchase and receive them from licensed wholesalers (2nd tier); and wholesalers purchase and receive them from licensed manufacturers (1st tier).[1] MCL 436.1203(1). App. 49a-52a. A limited exception to the three-tier system exists for licensed in-state wineries. They may operate in all three tiers and directly ship only their wine products to consumers in the State. MCL 436.1113(9). App. 49a. Such in-state wineries are further subject to very strict shipment laws and regulation. MCL 436.1203(1)-(8). App. 49a-52a.

There is no authorized system for licensing the direct shipment of alcoholic beverages from out-of-state wineries.

[1] 1st tier: MCL 436.1109(1), 1607(1), (Manufacturer); 2nd tier: MCL 436.1113(7), Rule 436.1719(5) (Wholesaler); and 3rd tier: MCL 436.1111(5), 1113(9) (Retailer). App. 45a-71a.



Out-of-state wineries must ship through the three-tier system. Alternatively, they may apply to the Liquor Control Commission to direct ship to consumers and bypass the three-tier system by Commission order. MCL 436.1203(1). A final Commission order denying a direct shipment request by an out-of-state unlicensed winery is appealable by right through the State court system. MCL 600.631. Licensees aggrieved of final Commission orders suspending or revoking their licenses only have a right to appeal through the State court system by leave. MCL 436.1903(2).

The policy of the Liquor Control Commission has been to deny requests for orders to bypass the three-tier system.[2] This is because under the three-tier system transactions and obligations of manufacturers, wholesalers and retailers are to be kept separated. MCL 436.1603; 1605; 1607. App. 55a-59a. With limited exceptions, manufacturers of alcohol may not also be wholesalers, nor may wholesalers be retailers. MCL 436.1113(7); 1537. App. 49a, 53a-54a.

The historical basis for the three-tier structure, as recognized by this Court, is to protect against the collusion, price-fixing and monopolization problems that existed before Prohibition. Other reasons for Michigan's three-tier structure include ensuring an orderly distribution and importation system that helps prevent illegal sales to minors and intoxicated persons and collect taxes. MCL 436.1203(1)-(8); 1701; 1801(2).[3] App. 49a-52a, 60a-66a. See *North Dakota v. United*

[2] Respondent Heald applied to the Liquor Control Commission for permission to direct ship out-of-state wine into the State under MCL 436.1203(1) and was denied. He did not appeal that denial to the State courts.

[3] The National Conference of State Liquor Administrators has estimated that these types of interstate sales result in state tax revenue losses of tens of millions of dollars. The states are also concerned that shipments may be made to underage drinkers. Quarterly Bulletin, Volume 2, March 16 to June 15, 2000, ATF Ruling 2000-1.

*States*, 495 U.S. 423, 432 (1990) (plurality opinion) (Such three-tier systems are "unquestionably legitimate.").

In-state wineries are excepted from the three-tier system because they are few in number, they are limited to selling their own products, and regulatory control over them is feasible for purposes of collecting taxes and assessing sanctions for violations of the liquor law.[4] Unlike out-of-state wineries, Michigan's retail wineries are directly subject to the State's strict regulatory licensing regimen that includes strict liability for sales to minors and intoxicated persons. MCL 436.1801(3). App. 63a-66a.

Respondents filed their lawsuit in the United States District Court for the Eastern District of Michigan alleging civil rights violations under 42 U.S.C. § 1983 and seeking injunctive and declaratory relief. Respondents specifically requested that Michigan's importation laws barring the shipment of wine into the State be declared unconstitutional. See MCL 436.1203; 1909 and Rules 436.1515; 1719(4). App. 49a-71a. The complaint asserted that Michigan's law as it relates to the importation of alcohol facially violated the Commerce Clause since it discriminated between out-of-state and in-state direct shipments of wine.

The District Court addressed Cross-Motions for Summary Judgment filed by the parties. Petitioners submitted evidence[5]

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[4] Over 21,000 wineries are accessible over the Internet, including 3397 nationwide. http://www.wineweb.com/scripts/wineryCount.cfm Michigan has 39 wineries. http://www.michiganwines.com.

[5] The evidence included but was not limited to: affidavits averring to prosecutions for illegal out-of-state direct shipments to minors; surveys showing the problem with underage drinking at State colleges and the widespread use of the Internet for ordering alcohol; and studies submitted by the *Amicus* Michigan Interfaith Council on Alcohol Problems and the *Amicus* State Universities demonstrating the widespread marketing of alcohol to minors.



with their motion showing the difficulty with effective enforcement over out-of-state shippers, including preventing out-of-state direct shipments of alcohol to minors, collecting taxes from such sales and obtaining jurisdiction.

The Petitioners' motion for summary judgment was granted and Respondents' motion was denied in an unpublished District Court Opinion. *Heald v. Engler*, 00-CV-71438, Slip. Op. (E.D. Mich. Sept. 28, 2001). App. 25a-35a. The District Court held that Michigan's direct shipment law was a permissible exercise of State power under the 21st Amendment. (Michigan's law is not "mere economic protectionism" because the State's statutory scheme is designed "to ensure the collection of taxes from out-of-state wine manufacturers and to reduce the risk of alcohol falling into the hands of minors." App. 34a-35a. Respondents' motion for reconsideration was denied by the District Court on November 5, 2001. In denying the motion the District Court held that the 21st Amendment authorizes states to regulate the flow of alcohol within their borders and the three-tier system is a proper exercise of that authority, despite the fact that such a system places a minor burden on interstate commerce. App. 38a-39a.

The District Court's decision was reversed by the United States Court of Appeals for the Sixth Circuit. The Court of Appeals declared Michigan's direct shipment law unconstitutional on its face, concluding that the regulations in question discriminate against out-of-state wineries, in violation of the Commerce Clause, and cannot be justified as advancing the traditional "core concerns" of the 21st Amendment. *Heald v. Engler*, 342 F.3d 517, 525-528 (6th Cir. 2003). App. 14a-18a. The Court of Appeals remanded the case back to the District Court for entry of summary judgment in favor of the Respondents. App. 19a-20a. On November 4, 2003, the Court of Appeals denied Petitioners Motion for Rehearing En Banc. App. 21a-22a. On November 21, 2003 the Court of Appeals

stayed its mandate pending the Petitioner's filing of a certiorari petition with this Court. App. 23a-24a.

## REASONS FOR GRANTING THE PETITION

Michigan imposes importation restrictions on direct shipments of alcoholic liquor from out-of-state distributors. The Court of Appeals declared these restrictions facially unconstitutional under the Commerce Clause despite the specific grant of authority of the 21st Amendment giving states the right to regulate the importation and transportation of beverage alcohol.

The Court of Appeals' decision conflicts with the Seventh Circuit's decision in *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *cert. denied, sub nom., Bridenbaugh v. Carter*, 532 U.S. 1002 (2001), and with the Eleventh and Fourth Circuits' decisions in *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002) and *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003). This Court should grant certiorari to resolve the conflict and for the following reasons.

### I. There is substantial conflict among the federal circuits in the interpretation of state rights to regulate the importation of alcoholic beverages under the 21st Amendment when the Commerce Clause is raised as a challenge to those rights.

The issue before this Court is of extraordinary importance in resolving conflicting federal law and in preserving a state's right to maintain control over the importation and transportation of alcohol within its borders. Many courts are



currently struggling with this issue, which has drawn considerable media attention and debate.[6]

Section 2 of the 21st Amendment is plain and clear. It provides direct authority to the states to regulate the sale, transportation and importation of alcohol by prohibiting "the transportation or importation into any State, Territory or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof . . ." Yet federal courts across the nation are inconsistent and in conflict with the interpretation of this constitutional amendment when it intersects with the Commerce Clause.

The Fourth, Fifth and Sixth Circuits apply no presumption of validity to the state's powers under the 21st Amendment to control the importation of alcohol when it finds facial discrimination with respect to in-state and out-of-state regulation over direct shipments of alcohol. *Beskind*, 325 F.3d at 517; *Dickerson v. Bailey*, 336 F.3d 388, 406-407 (5th Cir. 2003), and *Heald*, 342 F.3d at 524-527. These circuits treat the interstate transportation of alcohol no differently than cheese. In these circuits, if a state authorizes direct shipping of alcohol by in-state licensed wineries but not by unlicensed out-of-state wineries, the Commerce Clause has been held to "trump" the State's 21st Amendment powers. "Strict scrutiny" is applied to the State laws with little or no deference given to those state laws. In order to have the State statute upheld, states in these circuits must demonstrate that no reasonable nondiscriminatory alternatives are available to advance the same legitimate goals. The 21st Amendment is effectively discarded.

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[6] Court cases are pending in 24 states with the debate intensifying over the legality of laws banning direct shipment of alcohol, the Associated Press reported Oct. 22, 2003. http://www.jointogether.org/sa/news/summaries/reader/0,1854,567335,00.html. The issue is currently pending before the Second Circuit Court of Appeals. *Swedenburg v. Kelly*, (2nd Cir. 03-7089).

On the other hand, the Seventh Circuit applies a presumption of validity to the state's right to control the importation of alcohol in such instances. It declared that out-of-state direct shipment bans, with exemptions for in-state direct shipments, is a permissible exercise of a state's 21st Amendment rights. *Bridenbaugh,* 227 F.3d at 851-854.

The Sixth Circuit sought to distinguish *Bridenbaugh* from the circumstances in this case by suggesting that it involved consumers rather than out-of-state wineries and that the Indiana statute appeared different. *Heald,* 342 F.3d at 526-527. However, this case too involves consumer plaintiffs (13 of them) just as in *Bridenbaugh*. The Seventh Circuit in *Bridenbaugh* found that the consumers had standing to challenge the statute and the case similarly pitted the 21st Amendment against the Commerce Clause. Indiana's statute "permits local wineries, but not wineries in the business of selling . . . in another state or country, to ship directly to Indiana consumers." *Bridenbaugh,* 227 F.3d at 851. Michigan, in application of its shipping law, is the same as Indiana. Writing for the Seventh Circuit, Judge Easterbrook recognized that "§ 2 of the twenty-first amendment empowers Indiana to control alcohol in ways that it cannot control cheese" under the Commerce Clause. *Id.* Rejecting the "core purpose" argument adopted by the District Courts and relying on the text and history of the provision, the Seventh Circuit concluded that after the ratification of the 21st Amendment "[n]o longer may the dormant commerce clause be read to protect interstate shipments of liquor from regulation; § 2 speaks directly to these shipments." *Id.* at 853. The Seventh Circuit found no functional or unlawful discrimination. *Bridenbaugh* squarely conflicts with the Fourth, Fifth and Sixth Circuit decisions. *Id.* at 851-854.

The result of *Bridenbaugh* is that the neighboring states of Illinois, Indiana and Wisconsin may lawfully ban out-of-state



direct shipments of alcohol with in-state exemptions while the Sixth Circuit declares it unconstitutional for Michigan.

The Eleventh Circuit applied a lower level of scrutiny to an out-of-state direct shipment ban that conflicts with the decisions of the Fourth, Fifth and Sixth Circuits. The Eleventh Circuit in *Bainbridge* would uphold local direct shipping exemptions for wineries if a state demonstrates that the statutory scheme is "closely related" to a core power under the 21st Amendment and not a pretext for mere economic protectionism. *Bainbridge,* 311 F.3d at 1114. Under the Eleventh Circuit's decision, the state need not show there are no nondiscriminatory alternatives available and the evidentiary standard for showing core powers is far less than the strict scrutiny standard applied under a Commerce Clause analysis. *Id.* at p. 1114, Fn. 17.

The Fifth and the Fourth Circuits conflict on the remedy that should apply to state alcohol beverage laws found unconstitutional under the Commerce Clause. The Fifth Circuit applies a broad remedy striking the state direct shipment ban and allowing the unregulated flow of alcohol into Texas under the 21st Amendment. *Dickerson,* 336 F.3d at 407-410. In contrast the Fourth Circuit vacated a District Court decision striking down the core provisions of North Carolina's direct shipment ban as being overly broad and applied a "minimum-damage" approach, thereby affording some credence to the state's core concerns underlying the 21st Amendment. *Beskind,* 325 F.3d at 517-520.

The Sixth Circuit's decision creates confusion as to what remedy should be applied when a violation is determined. While Michigan's law allows for out-of-state direct shipment of alcohol by application and issuance of a Commission order [MCL 436.1203(1) App. 49a-52a], the Sixth Circuit did not consider this point in its decision. The Respondents requested that MCL 436.1203(1) and other State importation regulations

be declared invalid. If the relief Respondents request is ordered on remand, as appears to be required by the Court of Appeals' decision, Michigan's regulatory authority over the importation and distribution of alcohol will be gutted. MCL 436.1203(1) is the foundation for Michigan's three-tier system of alcohol importation and distribution. App. 49a-50a. If it and other State importation regulations requested are struck down, the direct shipment of wine, liquor and beer into the State would presumably be authorized. Application of such a broad remedy violates both the spirit and intent behind the 21st Amendment.

This Court has held that the 21st Amendment is "unfettered" by the Commerce Clause. *Ziffrin, Inc. v. Reeves,* 308 U.S. 132, 138 (1939); *Indianapolis Brewing Co. v. Liquor Control Comm'n,* 305 U.S. 391, 394 (1939); *State Bd. of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936).[7] Since that time this Court's decisions have distinguished cases based on circumstances that do not directly impact the importation or distribution of alcohol within a state's territory. The Sixth Circuit, along with the Fourth and Fifth Circuits, fail to recognize the factual distinctions of later cases of this Court, instead employing a virtual *per se* rule of invalidity to discriminatory state direct shipment bans.

Although subsequent decisions of this Court have held State liquor laws unconstitutional under the Commerce Clause, notwithstanding the 21st Amendment, such cases are

[7] The Court of Appeals found it "disingenuous" that Michigan relied upon this Court's precedent establishing that states have the right under the 21st Amendment to regulate the importation of alcohol unfettered by the Commerce Clause. *Heald,* 342 F.3d at 522. App. 8a-9a. However, no Supreme Court case to date has directly overruled those decisions as applied to the circumstances present in this case. Instead, this Court's opinions continue to rely upon these cases. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 514-516 (1996); *North Dakota v. United States,* 495 U.S. 423, 431-433 (1990); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 346 (1987).



distinguishable. Significantly, none of the cases implicated a state's "core powers" to regulate the "transportation or importation" of intoxicating liquor "for delivery or use therein."[8] One group of cases invalidated statutory provisions that, unlike here, regulated the transportation of alcoholic beverages for delivery to and use in a non-state destination (such as a military base or a destination outside the country) not under the jurisdiction of the state. Another group of cases invalidated state regulations, such as price regulations, that, unlike here, conflicted with existing federal statutes.[9]

A final group of cases invalidated state regulations that, unlike here, were created for purely economic reasons against out-of-state products or had the impermissible extra-territorial effect of regulating commerce in other states. The cases primarily relied upon by the Fourth, Fifth and Sixth Circuits include *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984), and *Healy v. Beer Inst.*, 491 U.S. 324 (1989). These cases, however, are inapposite.

In *Hostetter,* unlike here, ultimate delivery and use of the liquor was in a foreign country and not in New York. This Court has held that regulation not concerning delivery of

[8] See Smokey and the Bandit in Cyberspace, West Law, 19 Const. Comment. 297, 332-333.

[9] See *California Retail Liquor Dealer's Ass'n v. Midcal Alum.*, 445 U.S. 97, 112-114 (1980), (holding that resale price maintenance statute violates Sherman Act, 15 U.S.C. § 1); *Capital Cities Cable Inc. v. Crisp,* 467 U.S. 691, 712-713 (1984) ("when a State has not attempted directly to regulate the sale or use of liquor within its borders - the core § 2 power - a conflicting exercise of federal authority may prevail.")

alcoholic beverages inside the state are not within the core powers of the 21st Amendment.[10] *North Dakota*, 495 U.S. at 431-432. *Hostetter* is not applicable here since all alcohol is destined for consumption in Michigan.

In *Bacchus* the Court invalidated a Hawaii statute exempting locally produced pineapple wine from the state's excise tax that economically discriminated against out-of-state liquor. This Court held that the statute's purpose was not "designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment, but instead . . . the purpose was 'to promote a local industry.'" *Bacchus*, 468 U.S. at 276. In fact, it was pure economic protectionism and the 21st Amendment was never even raised as an issue in that case until it was before this Court. *Bacchus* simply does not apply to the circumstances of this case. Indeed, the District Court below found that Michigan's statutory scheme did not represent mere economic protectionism. App. 34a-35a. Moreover, the tax exemption in *Bacchus* had nothing to do with the policing of importation of alcohol, as do the direct shipping restrictions in Michigan.[11]

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[10] The Court in *Hostetter*, rejected as "an absurd oversimplification" the view that "the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause whenever regulation of intoxicating liquors is concerned." 377 U.S. at 331-332. However, it also characterized as "unquestioned" the view that by virtue of the 21st Amendment "a state is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution or consumption within its borders." *Id.* at 330.

[11] It is only when an alcoholic beverage statute involves some regulatory concern other than a state's core powers under the 21st Amendment that a court must balance state interests against any competing federal interest in regulating commerce. *Midcal Aluminum*, 445 U.S. at 110. Only "other" alcoholic beverage regulations that do not directly regulate importation into a state, require a balancing of state and federal interests in regulating commerce. *Id.*; see also *Capital Cities Cable*, 467 U.S. at 713.



In *Healy*, this Court invalidated a Connecticut price affirmation statute requiring out-of-state sellers to affirm that the prices charged in Connecticut were no higher than prices contemporaneously charged in nearby states. This Court concluded that the statute's effect was to impair the sellers' ability to competitively price products in bordering states. *Healy*, 491 U.S. at 343. The statute had the effect of controlling commercial activity occurring wholly outside the boundary of the state and thus did not impact the state's core powers under the 21st Amendment. No such facts are present here, as Michigan seeks to only regulate the sale, delivery and importation of alcohol within state borders.

## II. Michigan's law regulating importation of alcohol is a permissible exercise under the 21st Amendment.

Michigan Liquor Control Code § 203, MCL 436.1203 falls squarely within the core powers that the 21st Amendment reserved to the states. Specifically, § 203 prescribes the conditions under which alcoholic beverages may be sold, delivered or imported into Michigan, as expressly granted by the 21st Amendment.

Section 203 represents a valid exercise of the core powers that this Court has repeatedly recognized. By requiring that alcoholic beverages only be sold to consumers by responsible, accountable, and licensed in-state retailers, this Michigan law provides for an orderly, controlled market in which liquor, a potentially dangerous and frequently abused substance, is not delivered into the wrong hands and ensures that all such transactions are taxed and uniformly regulated.

Requiring that sales and direct shipment to consumers be through a Michigan licensed retailer assures jurisdiction over claims by persons injured as a result of irresponsible sales. Under Michigan's dram-shop law, MCL 436.1801(3), an in-

state retailer who unlawfully sells or provides alcohol to an underage purchaser or visibly intoxicated individual may be held liable for resulting injuries and death. App. 64a-65a. This State law only applies to in-state licensed retailers selling the alcohol and not to unlicensed out-of-state distributors or wineries. *Tennille v. Action Distrib.* Co., 225 Mich. App. 66, 70-73; 570 N.W.2d 130, 132-133 (1997); MCL 436.1113(9). Thus, a Michigan retailer (includes winery) that sells and delivers alcoholic beverages to a Michigan consumer is not only subject to administrative and criminal sanctions, but also may be held accountable to victims of alcohol-related accidents resulting from irresponsible sales. Conversely, Michigan residents injured by alcohol-related accidents resulting from unlawful sales outside the regulatory scheme would have no assurance that out-of-state sellers may be held accountable for their actions.[12]

The limits of a state's authority to regulate alcohol trafficking under the 21st Amendment were discussed in the plurality opinion delivered by Justice Stevens (in which Rehnquist, C.J., White and O'Connor, J.J., joined) in *North Dakota, supra,* 495 U.S. at 426-444, that involved North Dakota's regulations on labeling and reporting alcohol sold to federal military bases within the state. These regulations were upheld despite a challenge based on the Supremacy Clause, where the purchaser of the alcohol was the federal government, whose military bases are not subject to state regulation.

While noting that it had invalidated certain state liquor regulations where the area or transaction fell outside its jurisdiction, the plurality opinion, *id.* at 430-431, stated:

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[12] In *Butler v. Beer Across America*, 83 F. Supp. 2d 1261 (N.D. Ala. 2000), personal jurisdiction was found lacking against a vendor of beer in an action brought by the parents of a fifteen year old who had used his parents' credit card to order beer over the Internet.



> At the same time, however, within the area of its jurisdiction, the State has "virtually complete control" over the importation and sale of liquor and the structure of the liquor distribution system. The Court has made clear that the states have the power to control shipments of liquor during their passage through their territory and to take appropriate steps to prevent the unlawful diversion of liquor into their regulated intrastate markets.

The plurality opinion, *id.* at 433, then noted:

> Given the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly. [citation omitted]

A state's core powers under the 21st Amendment were delineated in the plurality opinion, *id.* at 439, as follows:

> The labeling and reporting regulations are components of an extensive system of statewide regulation that furthers legitimate interests in promoting temperance and controlling the distribution of liquor, in addition to raising revenue.

In his concurrence, *id.* at 447, Justice Scalia noted:

> The Twenty-first Amendment, which prohibits "the transportation or importation into any state . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof," is binding on the Federal Government like everyone else, and empowers North Dakota to require that all liquor sold for use in the state be purchased from a licensed instate wholesaler. Nothing in our Twenty-first Amendment case law forecloses that conclusion. In

> all but one of the cases in which we have invalidated state restrictions on liquor transactions between the Federal Government and its business partners, the liquor was found not to be for "delivery or use" in the state because its destination was an exclusive federal enclave.

This Court has consistently held that where, as here, a state's law implicates a "core power" under the 21st Amendment, it is immune from challenge and that the primary 21st Amendment "core power" is state control over the importation, sale and distribution process. *North Dakota, supra; Capital Cities Cable,* 467 U.S. at 712. The Court of Appeals' invalidation of Michigan's importation, sale and distribution process, is in conflict with these decisions because it obliterates Michigan's most basic "core power" secured by the 21st Amendment.

In addition to recognizing the State's primary core power under the 21st Amendment to regulate the transportation and importation of alcoholic beverages for sale within the State, this Court recognizes that states have other legitimate concerns (such as collection of tax revenues) when structuring a distribution system for alcoholic beverages. *North Dakota,* 495 U.S. at 432.

This case involves the "transportation or importation" of "intoxicating liquors" into Michigan "for delivery or use therein." Michigan law treats all such deliveries in the same way by requiring delivery to be accomplished by licensed and responsible parties that are accountable to Michigan and its citizens. Such an exercise is expressly within the State's core powers under the 21st Amendment. It advances legitimate State interests in promoting temperance, raising revenue, ensuring an orderly market and jurisdiction and accountability over the seller where redress for injuries is required.



## III. Using its Commerce Clause powers Congress has expressly delegated to the states the right to regulate the shipment and transportation of alcoholic beverages within its territory.

The Court of Appeals erred in analyzing this case under the "dormant Commerce Clause," because the Clause is not dormant here. This is because Congress exercised its Commerce Clause power in the Webb-Kenyon Act, 27 U.S.C. § 122, that provides "The shipment or transportation . . . of any . . . vinous . . . intoxicating liquor . . . into any state . . . to be . . . sold . . . in violation of *any law* of such state . . . is prohibited." (emphasis added). Thus Congress has unmistakably exercised its power under the Commerce Clause to reinforce and prevent from encroachment those state rights unambiguously provided for in the 21st Amendment. The Court of Appeals, however, has invalidated a state right that both the 21st Amendment and a federal statute not only permit, but expressly provide for.

Congress has power to regulate commerce among the states. However, any supposed residual dormant power is dispelled in that Congress has expressly exercised that Commerce Clause power in 27 U.S.C. § 122. The language "any law" in that statute plainly indicates the states occupy the field. A broader term than "any" is inconceivable. The residual power under the Commerce Clause, not displaced by the 21st Amendment, resides with Congress. Congress, therefore, has added its full weight under the Commerce Clause to the 21st Amendment to strengthen states' sovereign rights.

## IV. The Court of Appeals clearly applied the wrong level of scrutiny and accorded no deference to Michigan's law regulating the importation and shipment of alcoholic beverages.

The Court of Appeals' decision that Michigan's alcohol importation law is facially unconstitutional has significant

consequences on the level of scrutiny applied. *Heald,* 342 F.3d at 524-525. App. 13a-14a. A lower level of scrutiny is applied when a statute is not facially invalid. *Id.* In contrast to facial violations, remedies for as applied violations are greatly limited.

A court may declare a statute unconstitutional by: (1) declaring it invalid on its face, or (2) finding the statute unconstitutional as applied to a particular set of circumstances. The difference is important. If a court holds a statute unconstitutional on its face, the state may not enforce it under any circumstances. To do so, however, there must be no set of circumstances under which the statute is validly applied. In contrast, when a court holds a statute unconstitutional as applied to particular facts, the state may enforce the statute in different circumstances. *U.S. v. Salerno,* 481 U.S. 739, 745 (1987); *Sam & Ali v. Ohio Dep't of Liquor Control,* 158 F.3d 397, 402, Fn. 7 (6th Cir. 1998).

In analyzing Michigan's statutory scheme for facial unconstitutionality focus must be put on the statute itself and not how its Liquor Control Commission decides to apply or enforce it. Important statutory provisions allowing for the out-of-state direct shipment of wine to bypass the three-tier system were overlooked by the Court of Appeals in declaring Michigan's statute facially invalid. The Court of Appeals failed to recognize that such shipments can bypass the three-tier system in certain instances and nonetheless receive approval by Commission order. MCL 436.1203(1), (6), and (7)(a) and (b). App. 49a-52a. It is irrelevant that the Liquor Control Commission exercises its discretion under the statute to generally deny such requests. This is critical as the Respondents' challenge to the Michigan statutory scheme was a facial attack and the Court of Appeals' opinion found the statutory scheme facially discriminatory, applying a strict scrutiny analysis.



State Administrative Rule 436.1719(4) is incorrectly cited in the Court of Appeals' opinion for the proposition that shipments of wine can only be made to licensed wholesalers in the state except upon written order of the Commission. *Heald,* 342 F.3d at 521. App. 6a. The correct citation is Rule 436.1719(5). App. 70a-71a. However, that rule, like the statute, authorizes interstate direct shipments of alcohol by Commission order, which can bypass wholesalers. The only State statutory provision mentioned in the Court of Appeals' opinion is MCL 436.1113(9). *Id.* at 521. App. 6a. That statute defines "Winemaker" as any person licensed by the Commission to manufacture wine and sell, at wholesale or retail, wine manufactured by that person.

Remarkably, the Court of Appeals held that Michigan's statute was facially invalid despite the concession in Respondents' appellate brief that there was nothing in the Michigan law that prohibits out-of-state direct sales and shipments of beverage alcohol.[13]

There is no dispute that the Liquor Control Commission generally exercises its discretion under the law prohibiting out-of-state direct shipments and informs the public that such shipments are or may be illegal. However, the statutory scheme does not facially prohibit it. Simpler than the granting of a licensing application,[14] the Commission, by order, can authorize the direct shipment of out-of-state wine. MCL 436.1203(1). MCL 436.1203(1) was the focus of Petitioner's appellate brief before the Court of Appeals and this very issue

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[13] The Respondents acknowledged in their Sixth Circuit appellate brief "there is no express provision that an out-of-state merchant may not sell and deliver directly to Michigan residents" under Michigan's law. Appellant's Brief, pg. 3, Fn. 1.

[14] *Morris & Doherty, P.C. v. Lockwood*, 259 Mich. App. 38, 47 (2003); *Kudla v. Modde,* 537 F. Supp. 87, 89-90 (E.D. Mich, 1982). (There is no vested property interest in the granting of a license anymore than there is the granting of an order to direct ship.)

was raised to the court in the State's Petition for Rehearing *En Banc*. It was apparently not considered by the Court of Appeals and is material in determining whether Michigan law is facially unconstitutional.

Nor is the effect of the Court of Appeal's decision limited to the direct shipment of wine. If MCL 436.1203 and MCL 436.1909[15] are held unenforceable as requested by Respondents, there may likewise be nothing prohibiting the direct shipment of beer and spirits into the State. For example, if MCL 436.1113(9); 1203; 1909 are stricken or held unenforceable there would be no effective State three-tier system for alcohol distribution and there would be a dismantling of State regulatory authority to detour shipments of alcohol to minors. No longer would there be authority under MCL 436.1909 to prosecute unlicensed and unapproved sales of alcohol.[16]

State statutes enjoy a presumption of constitutionality. A state's interest in prohibiting the diversion of liquor into its territory is supported by a strong presumption of validity and should not be lightly set aside. *North Dakota*, 495 U.S. at 433. When reviewing a state statute, courts must construe it to avoid constitutional difficulty, giving deference to the statute whenever possible. *Webster v. Reproductive Health Services*, 492 U.S. 490, 514 (1989). Facial challenges to state statutes are the most difficult to mount successfully since it must be

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[15] MCL 436.1909 criminalizes the unapproved or unlicensed sale of alcoholic beverages. App. 69a.

[16] Ironically, the effect of the Sixth Circuit's decision is to leave licensed in-state entities subject to regulations that have not been stricken, while out-of-state importers would be free of any regulation.



established that no set of circumstances exists under which the Act would be valid. *U.S. v. Salerno*, 481 U.S. at 745.[17]

Had the Court of Appeals followed its own precedent in *Coleman v. Dewitt*, 282 F.3d 908, 914 (6th Cir. 2002), *cert. denied* 536 U.S. 914 (2002), and applied the *Salerno* "no set of circumstances" test to the Michigan statute it would have been compelled to find no facial violation. Clearly, the Michigan statute had a constitutional application. The constitutional application is that interstate direct shipments of wine are permissible either through the discretion of a Commission order or by other legal means under the State's statutory scheme. MCL 436.1203(1), (6), (7). App. 49a-52a.

In not applying the appropriate standard of review to the State statute, the Court of Appeals' decision conflicts with decisions of this Court and deprives Michigan the deference its laws are due in a case of unquestioned importance.

## V. Even without considering the specific grant of powers under the 21st Amendment, Michigan's statutory scheme does not violate the Commerce Clause.

The Commerce Clause grants to Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art I, § 8, cl. 3. "[T]hough phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a "negative" aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles

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[17] *S.D. Myers, Inc. v. City & County of San Francisco*, 253 F.3d 461, 467 (9th Cir. 2001) (applying *Salerno* to a Commerce Clause challenge and holding that the plaintiff "must establish that no set of circumstances exists under which the [challenged ordinance] would be valid" also applied in another Commerce Clause case, *U.S. v. Sage*, 92 F.3d 101, 106 (2nd Cir. 1996), *cert. denied*, 519 U.S. 1099 (1997).

of commerce." *Oregon Waste Sys, Inc. v. Dep't of Envt'l Quality*, 511 U.S. 93, 98 (1994).

The restriction imposed on states by the Commerce Clause is not absolute and "the states retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected." *Maine v. Taylor,* 477 U.S. 131, 138 (1986). The Commerce Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations. *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 127 (1978).

*Brown & Williamson v. Pataki*, 320 F.3d 200 (2nd Cir. 2003) provides a useful standard for evaluating dormant Commerce Clause challenges to state statutes. That case involved a challenge to a New York statute regulating the distribution of cigarettes. The provision prohibited most direct shipments of cigarettes to New York residents. As a result, sales had to be made by "brick and mortar" retailers. Out-of-state retailers who wished to ship cigarettes directly to New York consumers contended that the statute violated the dormant Commerce Clause. The District Court's holding that the statute violated the "dormant" Commerce Clause was reversed and the Second Circuit held, instead, that there was no violation sufficiently establishing a discriminatory effect in violation of the Commerce Clause. *Id.* at 210.

The Second Circuit in applying this Court's balancing test under *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), explained the constitutional inquiry as follows:

> [W]here the statute regulates even handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.



Michigan does not unlawfully discriminate against out-of-state shippers of wine. This Court finds unlawful discrimination only when a state discriminates among similarly situated in-state and out-of-state interests. *Brown & Williamson*, 320 F.3d at 216; *Ford Motor Co. v. Tex. DOT*, 264 F.3d 493, 500 (5th Cir. 2001), citing *Exxon Corp.*, 437 U.S. at 125-126. Out-of-state wineries are not similarly situated to in-state wineries for regulation purposes. Important State policing concerns justify the diversion of potentially large quantities of wine shipped from the numerous out-of-state wineries compared to the few from in-state wineries. Michigan wishes to use an hourglass type of system for screening out-of-state shipments to prevent sales to minors, ensure applicable excise and sales taxes are collected, and that equal exposure to the State's strict alcohol regulatory regiment is achieved.

Michigan's three-tier system applies equally to all in-state retailers, wholesalers and producers of alcohol with very limited exceptions. The magnitude of direct shipments by in-state wineries is inconsequential compared to those that would come from the numerous wine producers selling outside the State and regulatory control over that number of out-of-state shippers is not practicable without a three-tier system of distribution. See Fn. 4, *infra*. As found in *Brown & Williamson,* out-of-state shippers are nonbrick-and-mortar sellers and even if they ". . . did demonstrate that it would be 'unworkable' and 'uneconomic' for them to establish brick-and-mortar outlets [within the state], that is insufficient to establish a discriminatory effect." *Brown & Williamson,* 320 F.3d at 212.

Michigan does not prevent out-of-state wineries from obtaining winemaker licenses if they establish a presence in the State and comply with its laws. Nor does Michigan unduly burden the importation of beverage alcohol. MCL 436.1203(1) applies to every sale, delivery, or importation of alcoholic

liquor. The statute does not unlawfully discriminate between in-state and out-of-state origin, it merely provides regulatory safeguards for the direct shipment of alcoholic liquor. Alcohol is not an innocuous commodity such as cheese. Moreover, out-of-state wineries wanting to directly sell and ship beverage alcohol into Michigan are not similarly situated to in-state wineries for policing purposes.

Applying the *Pike* balancing test, the Second Circuit found the New York statute constitutional. It determined that "the regulation of the importation and sale of cigarettes, even if this regulation discourages the importation of cigarettes," has been recognized as a "legitimate exercise of state power in the public interest," and . . . the statute's "burdens on interstate commerce are not excessive relative to its local benefits." *Brown & Williamson,* 320 F.3d at 216-17. Likewise, Michigan's control over out-of-state direct sales and shipments of beverage alcohol to deter wide spread sales to minors and to ensure proper collection of taxes is of paramount public interest and is a legitimate State policing power recognized by this Court's jurisprudence. As the District Court below found, Michigan's system places a minimal or incidental burden on interstate commerce. App. 34a-35a, 38a-39a. That incidental burden is not excessive relative to its local benefits and does not violate the Commerce Clause.



## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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February, 2004

# APPENDIX



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**UNITED STATES COURT OF APPEALS**
FOR THE SIXTH CIRCUIT

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ELEANOR HEALD; RAY HEALD; JOHN ARUNDEL; KAREN BROWN; RICHARD BROWN; BONNIE MCMINN; GREGORY STEIN; MICHELLE MORLAN; WILLIAM HORWATH; MARGARET CHRISTINA; ROBERT CHRISTINA; TRISHA HOPKINS; JIM HOPKINS; DOMAINE ALFRED, INC.,
*Plaintiffs-Appellants,*

*v.*

JOHN ENGLER, Governor; JENNIFER M. GRANHOLM, Attorney-General; JACQUELYN STEWART, Chairperson, Michigan Liquor Control Commission, in their Official Capacities,
*Defendants-Appellees,*

Michigan Wine & Beer Wholesalers Association,
*Intervening Defendant-Appellee.*

No. 01-2720

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 00-71438 – Bernard A. Friedman,
District Judge.

Argued: May 7, 2003

Decided and Filed: August 28, 2003

Before: GUY, BOGGS, and DAUGHTREY, Circuit Judges.

## COUNSEL

**ARGUED:** James A. Tanford, INDIANA UNIVERSITY SCHOOL OF LAW, Bloomington, Indiana, for Appellants. Donald S. McGehee, OFFICE OF THE ATTORNEY GENERAL, MICHIGAN LIQUOR CONTROL COMMISSION, Lansing, Michigan, Anthony S. Kogut, WILLINGHAM & COTE', East Lansing, Michigan, for Appellees. **ON BRIEF:** James A. Tanford, INDIANA UNIVERSITY SCHOOL OF LAW, Bloomington, Indiana, for Appellants. Irene M. Mead, OFFICE OF THE ATTORNEY GENERAL, MICHIGAN LIQUOR CONTROL COMMISSION, Lansing, Michigan, Anthony S. Kogut, WILLINGHAM & COTE', East Lansing, Michigan, for Appellees. Louis R. Cohen, WILMER, CUTLER & PICKERING, Washington, D.C., William H. Mellor, Steven M. Simpson, INSTITUTE FOR JUSTICE, Washington, D.C., Clint Bolick, INSTITUTE FOR JUSTICE, Phoenix, Arizona, for Amici Curiae.

## OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. In this civil rights action brought pursuant to 42 U.S.C. § 1983, the plaintiffs raise a constitutional challenge to Michigan's alcohol distribution system, contending that state provisions differentiating between in-state and out-of-state wineries violate the Commerce Clause.[1] Those regulations prohibit the

[1]Similar actions have been brought challenging direct shipment bans in North Carolina, Virginia, Indiana, Texas, Florida and New York, among other states. *See, e.g., Beskind v. Easley,* 325 F.3d 306 (4th Cir. 2003) (affirming lower court finding that North Carolina's statutory scheme discriminates between in-state and out-of-state wineries, violates the Commerce Clause, and is not "saved" by the Twenty-first Amendment); *Bainbridge v. Turner,* 311 F.3d 1104, 1115 (11th Cir. 2002) (finding that Florida's alcohol distribution statutes' differentiation between in-state and out-of-state wineries facially discriminates against interstate commerce and remanding for further fact-finding on whether Florida's statutory scheme is "necessary to effectuate the . . . core concern [of revenue raising] in a way that justifies treating out-of-state firms differently from in-state firms"); *Bridenbaugh v. Freeman-Wilson,* 227 F.3d 848, 851 (7th Cir. 2000) (finding that Indiana's ban on direct shipment from out-of-state wineries is constitutional because " § 2 of the twenty-first amendment empowers Indiana to control alcohol in ways that it cannot control cheese"); *Swedenburg v. Kelly,* 232 F. Supp. 2d 135 (S.D. N.Y. 2002) (finding that New York's ABC law's ban on direct shipment of out-of-state wine is unconstitutional); *Dickerson v. Bailey,* 212 F. Supp. 2d 673, 695 (S.D. Tex. 2002) (finding that Texas's ban on direct shipment by out-of-state wineries violates the dormant Commerce Clause and noting that the state had "fail[ed] to demonstrate how a statutory exception for local wineries from Texas' three-tier regulatory system . . . is justified by any of the traditional core concerns of the twenty-first amendment" or to show "that the core interests of taxation and orderly market conditions . . . could not be effected by alternative, nondiscriminatory options for these out-of-state wineries"), *aff'd, Dickerson v. Bailey,* 336 F.3d 388 (5th Cir. 2003); *Bolick v. Roberts,* 199 F. Supp. 2d 397, 409 (E.D.Va. 2002) (adopting, with amendments, magistrate judge's findings that Virginia's ABC laws violated the dormant Commerce Clause and that the state had failed to produce "any meaningful evidence" showing that the state cannot "accomplish its legitimate interests without discriminating against out-of-state direct shippers of wine"), *vacated by Bolick v. Danielson,* 330 F.3d 274 (4th Cir. 2003) (remanding for reconsideration in light of intervening change in applicable statutes); *see also Cooper v. McBeath,* 11 F.3d 547 (5th Cir. 1994) (striking down Texas's three-year durational residency and citizenship requirements for obtaining a liquor permit because these restrictions violated the dormant Commerce Clause and were not "saved" by the Twenty-first Amendment).



direct shipment of alcoholic beverages from out-of-state wineries, while allowing in-state wineries to ship directly to consumers, provided that the in-state wineries comply with certain minimal regulatory requirements. The plaintiffs, who include wine connoisseurs, wine journalists, and one small California winery that ships its wines to customers in other states, claim that this system is unconstitutional under the dormant Commerce Clause because it interferes with the free flow of interstate commerce by discriminating against out-of-

state wineries. The defendants, who include Michigan officials (referred to collectively in this opinion as "the state") and the intervening trade association, argue in response that Michigan's regulatory scheme is constitutional under the Twenty-first Amendment to the federal constitution.

The parties filed cross-motions for summary judgment, and the district court granted the state's motion and denied the plaintiffs' motion. The plaintiffs then filed a motion to reconsider, arguing that the district court should have addressed cross-motions to strike various evidence submitted by the two sides prior to the summary judgment decision.[2] The

[2]Affidavits submitted by the plaintiffs included statements from various oenophiles; the Healds, who are wine critics and consultants; Domaine Alfred, a California winery; and several other wine and alcohol manufacturers and distributers. Many of the affiants attested to their desire to have wine from out-of-state wineries shipped directly to their homes, their inability to do so, the general unavailability of certain wines in Michigan, and the willingness of the wineries and distributors to pay required taxes and obtain necessary permits, if allowed to ship directly to consumers.

Documents filed on behalf of the defendants included reports from the Michigan Department of Treasury, Office of Revenue and Tax Analysis, which detailed estimates of lost tax revenue to remote sales; an affidavit from the manager of the Manufacturers and Wholesalers Section of the Licensing Division of the Michigan Liquor Control Commission that listed all licensed "Outstate Seller of Wine" license holders; an affidavit from the director of the Licensing Division of the Michigan Liquor Control Commission averring that, of the wineries from which the plaintiffs wish to purchase wine, some are licensed as out-of-state sellers, and the others have not applied for such licenses; an affidavit from the director of the Enforcement Division of the Michigan Liquor Control Commission detailing the number of "controlled buy operations" conducted by the Commission in Michigan to identify retailers that sell alcohol to minors; an affidavit from an assistant in the Liquor Control Division of the Michigan Department of Attorney General, detailing controlled buy operations conducted over the internet; and an (unsworn) statement by Sen. Orrin Hatch, made before the Senate Judiciary Committee, entitled "Interstate Alcohol Sales and the 21st Amendment."



district court denied the motion to reconsider, noting that it had effectively denied the cross-motions to strike as moot, because it did not consider the challenged evidence in deciding the summary judgment motions.

The plaintiffs now appeal both the grant of summary judgment and the denial of their motion to reconsider. For the reasons set out below, we conclude that the regulations in question are discriminatory in their application to out-of-state wineries, in violation of the dormant Commerce Clause, and cannot be justified as advancing the traditional "core concerns" of the Twenty-first Amendment. We therefore reverse the district court's judgment and remand the case with directions to the district court to enter judgment in favor of the plaintiffs.

## *PROCEDURAL AND FACTUAL BACKGROUND*

Michigan regulates alcohol sales under a "three-tier system": consumers must purchase alcoholic beverages from licensed retailers; retailers must purchase them from licensed wholesalers; and wholesalers must purchase them from licensed manufacturers. This system is similar to that used by most states. *See* Vijay Shankar, *Alcohol Direct Shipment Laws*, 85 Va. L. Rev. 353, 355 (1999).

The plaintiffs allege that Michigan's system discriminates against out-of-state wineries in favor of in-state wineries because it prevents out-of-state wineries from shipping wine directly to Michigan consumers, which in-state wineries are allowed to do. As the district court correctly noted, this distinction between in-state and out-of-state wineries can only be understood by reading a number of provisions in conjunction with each other:

> [The distinction] can be gleaned from various Michigan Liquor Control Commission regulations, which are codified within the

Michigan Administrative Code. R436.1057 states that "[a] person shall not deliver, ship, or transport into this state beer, wine, or spirits without a license authorizing such action. . . ." The only applicable license, an "outstate seller of wine license," may according to R436.1705(2)(d) be obtained by a "manufacturer which is located outside of this state, but in the United States, and which produces and bottles its own wine." However, under R436.1719(4) the holder of such a license may ship wine "only to a licensed wholesaler at the address of the licensed premises except upon written order of the commission." In answers to interrogatories, a representative of the Michigan Liquor Control Commission indicates that "[a]t present, there is no procedure whereby an out-of-state retailer or winery can obtain a license or approval to deliver wine directly to Michigan residents . . . ."

> In contrast, the Michigan Liquor Control Commission indicates that the "ability to deliver wine to the consumer is available to winemakers licensed in Michigan, inasmuch as under the provisions of MCL 436.1113(9) these licensees are permitted to sell at retail the wines they manufacture. . . . A licensed Michigan winemaker may deliver their [sic] own products to customers without an SDM [specially designated merchant] license . . . .

The plaintiffs contend that this differential treatment of in-state and out-of-state wineries violates the dormant Commerce Clause because it gives in-state wineries a competitive advantage over out-of-state wineries. In-state wineries can, for example, bypass the price mark-ups of a wholesaler and retailer, making in-state wines relatively cheaper to the



consumer and allowing them to realize more profit per bottle. In addition, the cost to an out-of-state winery of the license that enables it to sell to a Michigan wholesaler is $300, while a comparable Michigan winery must pay only a $25 license fee to qualify to ship wine directly to Michigan customers. Finally, for customers who desire home delivery, Michigan wineries have a competitive advantage over out-of-state wineries that cannot ship directly to customers. In response, the state argues that the regulations to which an in-state winery is subject "more than offset, both in costs and burden, any nominal commercial advantage given by the ability to deliver directly to customers" and characterizes the burden on out-of-state wineries as "de minimis."

In its order granting summary judgment to the state and denying summary judgment to the plaintiffs, the district court held that "Michigan's direct shipment law is a permitted exercise of state power under § 2 of the 21st Amendment" because it is not "mere economic protectionism." In reaching this conclusion, the court found that Michigan's statutory scheme was designed "to ensure the collection of taxes from out-of-state wine manufacturers and to reduce the risk of alcohol falling into the hands of minors."

After this order had issued, the plaintiffs filed a motion to reconsider, asking the district court to rule on the motions to strike before granting either side summary judgment and to "make specific findings of fact based on the record" before reaching a final decision. The plaintiffs argued that the district court's failure to rule on the motions to strike "left the record devoid of evidence supporting the court's conclusion that the direct shipment law furthers legitimate 21st Amendment purposes," and that the court had applied the incorrect legal standard in dismissing the complaint. The district court denied the plaintiffs' motion for reconsideration, saying that it had not considered the challenged evidence in ruling on the summary

judgment motions and that the motions to strike were effectively denied as moot.

For the reasons set out below, we reverse the district court's judgment, vacate the order granting summary judgment in the state's favor, and remand the case for entry of summary judgment in favor of the plaintiffs.

## *DISCUSSION*

The central question in this case is how the "dormant" Commerce Clause and the Twenty-first Amendment interact to limit the ways in which a state can control alcohol sales and distribution. Article I, Section 8, Clause 3 of the United States Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." The Supreme Court has long held that "this affirmative grant of authority to Congress also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy v. The Beer Institute,* 491 U.S. 324, 326 n.1 (1989) (citations omitted).

In 1933, Congress enacted the Twenty-first Amendment, which repealed the 18th Amendment, thereby ending Prohibition. Section 2 of the Twenty-first Amendment prohibits "[t]he transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof . . . ." Initially, the Supreme Court afforded the states nearly limitless power to regulate alcohol under the new amendment. *See, e.g., Ziffrin, Inc. v. Reeves,* 308 U.S. 132, 138 (1939) ("The Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause."); *Indianapolis Brewing Co. v. Liquor Control Comm'n,* 305 U.S. 391, 394 (1939) ("Since the Twenty-first Amendment . . . the right of a state to



prohibit or regulate the importation of intoxicating liquor is not limited by the Commerce Clause. . . ."); *State Bd. of Equalization v. Young's Market Co.,* 299 U.S. 59 (1936).

The state relied on these cases in the district court, but we find that reliance disingenuous at best because, as early as the 1960s, the Supreme Court signaled a break with this line of reasoning. In *Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324, 331-32 (1964), a case involving the prohibition of liquor sales to departing international airline travelers, the Court observed:

> To draw a conclusion from this line of decisions [*Ziffrin*, *Young's Market*, etc.] that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been pro tanto 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect. . . .
>
> Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.

The Supreme Court's approach to cases involving the intersection of the Commerce Clause and the Twenty-first Amendment has continued to develop since *Hostetter*. In *Capital Cities Cable v. Crisp,* 467 U.S. 691 (1984), although not a liquor importation or Commerce Clause case, the Court

> found that a state ban on alcohol advertising conflicted with regulations of the Federal Communications Commission. The Court applied a balancing test to determine "whether the interests implicated by a state regulation are so closely related to the powers reserved by the [Twenty-first] Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." *Id.* at 714. The Court concluded that the federal interest must prevail because the state's banning of alcohol advertising did not directly relate to the core concerns of the Twenty-first Amendment, *i.e.*, to exercise "control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Id.* at 715 (quotation omitted).

In subsequent cases, the Supreme Court has continued to analyze challenges to state alcohol laws by determining how closely related the law in question is to the "core concerns" of the Twenty-first Amendment. Shortly after *Capital Cities* was decided, the Court issued *Bacchus Imports v. Dias,* 468 U.S. 263 (1984), in which out-of-state wholesalers challenged a Hawaii excise tax exemption for certain locally produced alcoholic beverages. The state argued that the statute advanced legitimate state interests, that it imposed no patent discrimination against interstate trade, and that the effect on interstate commerce was minimal. *Id.* at 270. The Court rejected these defenses, finding that "the legislation constitutes 'economic protectionism' in every sense of the phrase," *id. at 272*, and noting that "one thing is certain: The central purpose of the [21st Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition." *Id.* at 276. Instead, the Court considered "whether the principles underlying the [Twenty-first] Amendment are sufficiently implicated by the [tax exemption] to outweigh the Commerce



Clause principles that would otherwise be offended." *Id.* at 275. In *Bacchus*, the state did not contest that the law's purpose was "to promote a local industry," so the Court did not have to engage in the normal Commerce Clause analysis of whether the law was sufficiently closely related to the promotion of lawful interests to vitiate its discriminatory effect. Instead, it found that the law discriminated against interstate commerce in violation of the Commerce Clause and was therefore unconstitutional.

Since *Bacchus*, the Supreme Court has been less than prolific in construing the content of the Twenty-first Amendment's "core concerns," addressing the definition of "core concerns" only once - and then only in a plurality opinion. In *North Dakota v. United States,* 495 U.S. 423 (1990), the Court had before it an intergovernmental immunity case, rather than a Commerce Clause challenge. At issue was whether North Dakota's reporting and labeling requirements were constitutional, despite interfering with contrary federal interests in selling liquor to military personnel. The Court upheld the statute, finding that the state regulations "fall within the core of the State's power under the *Twenty-first Amendment*" because they were enacted "[i]n the interest of promoting temperance, ensuring orderly market conditions, and raising revenue . . . ." *Id.* at 432.

But, because *North Dakota* did not involve a Commerce Clause challenge, the *analysis* in the plurality opinion cannot be taken to control the analysis in this case. That is, we do not interpret the "in the interest of" language to mean that a state need only be *motivated* by the "core concerns" of the Twenty-first Amendment to shield its laws from constitutional scrutiny. Under a Commerce Clause analysis, facially discriminatory laws are still subject to strict scrutiny, meaning that the state must demonstrate that no reasonable nondiscriminatory alternatives are available to advance the same legitimate goals. *See, e.g., Hughes v. Oklahoma,* 441 U.S. 322, 336-7 (1979)

(finding that, "at a minimum," a statute that "on its face discriminates against interstate commerce . . . invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives"). Likewise, the language in *North Dakota* to the effect that the states have "virtually complete control" over the importation and sale of liquor, although heavily emphasized by the district court in this case, has little value in a case requiring a Commerce Clause analysis. Because *North Dakota* did not involve interpretation of the Commerce Clause, we reject the implication that a state's "virtually complete control" over liquor regulation enables it to discriminate against out-of-state interests in favor of in-state interests. *Bacchus* simply forbids such an analysis.

Given this background, we cannot endorse the district court's characterization of the regulation in this case as a constitutionally benign product of the state's three-tier system and, thus, "a proper exercise of [Michigan's Twenty-first Amendment] authority, despite the fact that such a system places a minor burden on interstate commerce." Instead, we invoke Justice Scalia's view, expressed in an opinion concurring in the Supreme Court majority's decision striking down a state price-affirmation statute, in which he explained that:

> [The law's] invalidity is fully established by its facial discrimination against interstate commerce . . . . This is so despite the fact that the law regulates the sale of alcoholic beverages, since its discriminatory character eliminates the immunity afforded by the Twenty-first Amendment.

*Healy v. Beer Institute*, 491 U.S. 324, 344 (1989) (Scalia, J., concurring) (citations omitted).

The proper approach in this case, then, is to apply the traditional dormant Commerce Clause analysis and, if the



provisions are unconstitutional under the Commerce Clause, to determine whether the state has shown that it has no reasonable nondiscriminatory means of advancing the "core concerns" of the Twenty-first Amendment.

In reviewing challenges brought under the Commerce Clause, the Supreme Court has long held that statutes that facially discriminate are "virtually *per se*" invalid, citing as a clear example "a law that overtly blocks the flow of interstate commerce at a State's borders." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). However, a lower level of scrutiny is applied when a statute does not discriminate on its face:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . [T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

*Id.*, *quoting Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Moreover, we have recognized the following test for determining whether state economic regulations violate the dormant Commerce Clause:

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [the Supreme Court has] generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, [the Supreme Court

> has] examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.

*McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery,* 226 F.3d 429, 442 (6th Cir. 2000) (quotations omitted).

As we indicated in *McNeilus*, the proper starting point for dormant Commerce Clause analysis is to determine whether, in fact, the state provision "directly, in effect, or in purpose treats in-state and out-of-state interests differently . . . ." *Id.* If a court finds that the statute does discriminate, then the issue becomes, applying "rigorous scrutiny [,] . . . whether the statute serves a legitimate state interest that cannot otherwise be met." *Id.* In other words, laws that facially discriminate are normally invalid, unless they advance "a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind. v. Limbach,* 486 U.S. 269, 278 (1988) (citations omitted).

Here, it is clear that the Michigan statutory and regulatory scheme treats out-of-state and in-state wineries differently, with the effect of benefitting the in-state wineries and burdening those from out of state. As discussed above, Michigan wineries enjoy both greater access to consumers who wish to have wine delivered to their homes, and greater profit through their exemption from the three-tier system. Out-of-state wineries, on the other hand, must participate in the costly three-tier system, to their economic detriment and, although this is not clear from the record, may be shut out of the Michigan market altogether if unable to obtain a wholesaler. The Fourth Circuit reached a similar conclusion in a case considering North Carolina's alcohol distribution system, which is nearly identical to Michigan's. In *Beskind v. Easley,*



325 F.3d 506 (4th Cir. 2003), the court found that North Carolina's alcohol distribution laws, which discriminate against out-of-state wineries in favor of in-state wineries, are unconstitutional unless "the State can show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 515 (internal quotations and citations omitted).

Having determined that the provision is facially discriminatory, we now turn to the question of whether the regulatory scheme is nevertheless constitutional because it "fall[s] within the core of the State's power under the Twenty-first Amendment," having been enacted "in the interest of promoting temperance, ensuring orderly market conditions, and raising revenue," *North Dakota v. United States,* 495 U.S. 423, 432 (1990), and because these interests "cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind. v. Limbach,* 486 U.S. 269, 278 (1988) (citations omitted).

> We conclude, based on the evidence in the record, that defendants have not shown that the Michigan scheme's discrimination between in-state and out-of-state wineries furthers any of the concerns listed above, much less that no reasonable non-discriminatory means exists to satisfy these concerns. This is so even if, taking the evidence in the light most favorable to defendants, we assume that all of the evidence they submitted was admissible. It is important to keep in mind that the relevant inquiry is not whether Michigan's three-tier system *as a whole* promotes the goals of "temperance, ensuring an orderly market, and raising revenue," but whether the discriminatory scheme challenged in this case - the direct-shipment ban for out-of-state wineries - does so. *See, e.g., Beskind,* 325 F.3d at 517 ("The question is not whether North Carolina can advance its regulatory purpose by imposing fewer burdens on in-state wineries than out-of-state wineries . . . . Rather, the question is whether *discriminating* in favor of in-state wineries . . . serves a Twenty-first Amendment

interest."). Obviously, the state bears the burden of justifying a discriminatory statute, and "the standards for such justification are high." *New Energy Co.*, 486 U.S. at 278; *see also Cooper v. McBeath*, 11 F.3d 547, 553 (5th Cir. 1994) (describing the burden of proof faced by the state as "towering"); *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) ("[F]acial discrimination by itself may be a fatal defect. . . . [A]t a minimum [it] invokes the strictest scrutiny.").

The district court correctly recognized that state liquor laws are not completely immune from Commerce Clause challenges, but it placed too much reliance on Supreme Court precedent that has specifically upheld the three-tier distribution system, quoting *North Dakota v. United States*, 495 U.S. at 431, for the proposition that the states have "virtually complete control" over the importation and sale of liquor. As we noted above, however, *North Dakota* involved a Supremacy Clause challenge and did not implicate the Commerce Clause. It therefore cannot be relied on in this case in light of Supreme Court cases that do discuss the intersection of the Twenty-first Amendment and the Commerce Clause, such as *Bacchus*.

Nor do we find persuasive the district court's reliance on three additional cases. One, *House of York, Ltd. v. Ring*, 322 F. Supp. 530 (S.D.N.Y. 1970), is a district court opinion that pre-dates *Bacchus*. The second, *Bainbridge v. Bush*, 148 F. Supp. 2d 1306 (M.D.Fla. 2001), has subsequently been reversed. *See Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002) (holding that the state must show that an alcohol-distribution statute that discriminates between in-state and out-of-state wineries furthers core concerns of the Twenty-first Amendment in order to survive a Commerce Clause challenge). The third, *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), is the sole federal court of appeals decision to find that analogous direct shipment laws are constitutional under the Twenty-first Amendment. However, *Bridenbaugh* is distinguishable on its facts, and it has been criticized by several



federal courts for its failure to engage in the requisite dormant Commerce Clause analysis. *See, e.g., Bolick v. Roberts*, 199 F. Supp. 2d 397, 408 (E.D. Va. 2002) (finding *Brindenbaugh* "improperly decided because it does not rely on the established dormant Commerce Clause analysis"); *Dickerson v. Bailey*, 212 F. Supp. 2d 673, 682 (S.D. Tex. 2002) (observing that in its "concentration on Indiana's three-tiered scheme . . . [the court] did not discuss the last forty years of Supreme Court jurisprudence relating to balancing and harmonizing the dormant commerce clause and § 2 of the twenty-first Amendment"), *aff'd*, *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003) (finding that *Brindenbaugh* was factually distinguishable from that case); *Bainbridge v. Turner*, 311 F.3d 1104, 1114 n.15 (11th Cir. 2002) (commenting that the court "disagree[s] with the analytical framework used in [*Bridenbaugh*]").

For example, *Bridenbaugh* did not involve any out-of-state wineries as plaintiffs, and it thus addressed only whether the Indiana statute discriminated against customers who wanted to have out-of-state wine shipped directly to them. Furthermore, it appears the Indiana statutes differ from the provisions at issue here, as the court found that "Indiana insists that *every* drop of liquor pass through its three-tiered system and be subjected to taxation." *Bridenbaugh*, 227 F.3d at 853. Michigan, on the other hand, effectively exempts in-state wineries from the three-tier system, an exemption it does not extend to out-of-state wineries. Finally, in contrast to this case, the *Bridenbaugh* plaintiffs were "concerned only with direct shipments from out-of-state sellers who lack *and do not want* Indiana permits." *Id.* at 854. By contrast, the plaintiffs in this case are willing to acquire Michigan permits and pay taxes on wines shipped; they simply want to be eligible for such permits on the same basis as in-state wineries. For all of these reasons, we do not find the opinion in *Bridenbaugh* persuasive.

The district court in this case was correct in finding that the Michigan alcohol distribution system discriminates between in-state and out-of-state interests to the extent that in-state wineries may obtain licenses to ship wine directly to consumers, but out-of-state wineries may not and are instead required to go through the more costly three-tier system. What the district court did not do was undertake the necessary analysis that follows from such a finding. Instead, it concluded that Michigan's system "cannot be characterized as 'mere economic protectionism,'" because the system furthers the "core concerns" of the Twenty-first Amendment. The district court's observation that "[t]he Michigan Legislature has chosen this path to ensure the collection of taxes from out-of-state wine manufacturers and to reduce the risk of alcohol falling into the hands of minors" and its conclusion that "the 21st Amendment gives it the power to do so," without more, do not constitute strict scrutiny, as required by Supreme Court precedent. It is not enough that the Michigan Legislature has chosen this particular regulatory scheme to further what are legitimate objectives. The proper inquiry, detailed above, is whether it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind. v. Limbach,* 486 U.S. 269, 278 (1988). We find no evidence on this record that it does.

## *CONCLUSION*

For the reasons set out above, we REVERSE the judgment of the district court granting summary judgment to the defendants and REMAND the case for entry of judgment in favor of the plaintiffs.



UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-2720

FILED
AUG 28 2003
LEONARD GREEN, Clerk

ELEANOR HEALD; RAY HEALD; JOHN ARUNDEL; KAREN BROWN; RICHARD BROWN; BONNIE McMINN; GREGORY STEIN; MICHELLE MORLAN; WILLIAM HORWATH; MARGARET CHRISTINA; ROBERT CHRISTINA; TRISHA HOPKINS; JIM HOPKINS; DOMAINE ALFRED, INC.,
Plaintiffs – Appellants,

v.

JOHN ENGLER, Governor; JENNIFER M. GRANHOLM, Attorney General; JACQUELYN STEWART, Chairperson, Michigan Liquor Control Commission, in their Official Capacities,
Defendants – Appellees,
MICHIGAN WINE & BEER WHOLESALERS ASSOCIATION,
Intervening Defendant – Appellee.

Before: GUY, BOGGS, and DAUGHTREY, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED and the case is REMANDED for entry of judgment in favor of the plaintiffs.

ENTERED BY ORDER OF THE COURT

S/S

Leonard Green, Clerk



No. 01-2720

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
NOV 4 2003
LEONARD GREEN, Clerk

ELEANOR HEALD, ET AL.,

Plaintiffs-Appellants,

v. ORDER

JOHN ENGLER, GOVERNOR, ET AL.,

Defendants-Appellees,

MICHIGAN WINE & BEER WHOLESALERS ASSOCIATION,

Intervening-Defendant-Appellee.

BEFORE: BOGGS, Chief Judge; GUY and DAUGHTREY, Circuit Judges.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

S/S
Leonard Green, Clerk



Case No: 01-2720

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

FILED
NOV 21 2003
LEONARD GREEN, Clerk

ELEANOR HEALD; RAY HEALD; JOHN ARUNDEL; KAREN BROWN; RICHARD BROWN; BONNIE MCMINN; GREGORY STEIN; MICHELLE MORLAN; WILLIAM HORWATH; MARGARET CHRISTINA; ROBERT CHRISTINA; TRISHA HOPKINS; JIM HOPKINS; DOMAINE ALFRED, INC.

Plaintiffs-Appellants,

v.

JOHN ENGLER, Governor; JENNIFER M. GRANHOLM, Attorney General; JACQUELYN STEWART;

Defendants-Appellees,

MICHIGAN WINE & BEER WHOLESALERS ASSOCIATION,

Intervening-Defendants-Appellees.

BEFORE: BOGGS, Chief Judge; GUY and DAUGHTREY, Circuit Judges.

Upon consideration of the appellee's motion to stay mandate,

It is ORDERED that the mandate be stayed to allow 90 days time to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case, but shall promptly issue if the petition is not filed within ninety days from the date of final judgment by this court.

ENTERED BY ORDER OF THE COURT

S/S
Leonard Green, Clerk



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELEANOR HEALD, et al.,

Plaintiffs,

Civil Action No.
00-CV-71438-DT

vs.

HON. BERNARD A. FRIEDMAN

JOHN ENGLER, et al.,

Defendants,

and

MICHIGAN BEER AND WINE WHOLESALERS ASSOCIATION,

Intervening Defendant.

RECEIVED
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Dept of Attorney General
LCC Division-Lansing

**OPINION AND ORDER DENYING DEFENDANTS' MOTION TO DISMISS, DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

This matter is presently before the court on cross motions for summary judgment. The issues have been fully briefed and the court has heard oral argument. For the reasons stated below, the court shall grant defendants' motion and deny plaintiffs' motion.

The plaintiffs in this case are Michigan residents who are wine connoisseurs, wine journalists, and wine collectors. One of the

plaintiffs, Domaine Alfred, Inc., is a small California winery that ships its wines to customers in other states. The defendants are Michigan's governor, Michigan's attorney general, and the chair of Michigan's Liquor Control Commission. The Michigan Beer and Wine Wholesalers Association has intervened as a defendant. In addition, amicus briefs have been filed by the Michigan Interfaith Council on Alcohol Problems and by a collection of Michigan public universities, both of which support the defendants' position.

Plaintiffs have brought this action to challenge an aspect of Michigan's alcohol distribution system. Under Michigan's long-established "three-tier system," consumers must purchase alcoholic beverages from licensed retailers; retailers must purchase them from licensed wholesalers; and wholesalers must purchase them from licensed manufacturers. In one form or another, the three-tier distribution system is in place in most states. See *Bainbridge v. Bush,* 148 F. Supp. 2d 1306, 1308 (M.D. Fla. 2001); Vijay Shanker, *Alcohol Direct Shipment Laws*, 85 Va. L. Rev. 353, 355 (1999).

Plaintiffs challenge the provision of Michigan's alcohol distribution system that generally prohibits manufacturers of alcoholic beverages from shipping their products directly to Michigan consumers. Plaintiffs note that Michigan law makes an exception for Michigan wineries, which may ship their wines directly to Michigan consumers. No such exception is made for out-of-state wineries, which are required to sell their wines through Michigan wholesalers.[3] Plaintiffs argue that this

[3]This distinction between in-state and out-of-state wineries is not directly apparent from the statutory framework. However, it can be gleaned from various Michigan Liquor Control Commission regulations, which are codified within the Michigan Administrative Code. R436.1057 states that "[a] person shall not deliver, ship, or transport into this state beer, wine, or spirits without a license authorizing such action, ..." The only applicable license, an "out of state seller of wine licence [sic]," may according to R436.1705(2)(d) be obtained by a "manufacturer which is located outside of this state, but in the United States, and which produces and bottles its own wine." However, under R436.1719(4) the holder of such a license may ship wine "only to a licensed wholesaler at the address of the licensed premises except upon written order of the commission." In answers to interrogatories, a representative of the Michigan Liquor Control Commission indicates that "[a]t present, there is no procedure whereby an out-of-state retailer or winery can obtain a license or approval to deliver wine directly to Michigan residents." See defendant Stewart's answers to interrogatories, Answer 16.

In contrast, the Michigan Liquor Control Commission indicates that the "ability to deliver wine to the consumer is available to winemakers licensed in Michigan, inasmuch as under the provisions of MCL 436.1113(9) these licensees are permitted to sell at retail the wines they manufacture ... A licensed Michigan winemaker may deliver their [sic] own products to customers without an SDM [specially designated merchant] license." *Id.* Answer 8.



statutory scheme discriminates against out-of-state wineries, and interferes with the free flow of commerce, in violation of the dormant Commerce Clause.[4] Plaintiffs allege that this discrimination puts out-of-state wineries at a competitive disadvantage because they must incur the expense of channeling their wines through wholesalers and retailers, whereas in-state wineries may act as retailers and sell directly to Michigan consumers. Plaintiffs contend many small out-of-state wineries, which either cannot afford or choose not to pay this additional expense, are effectively excluded from the Michigan market. This, it is alleged, harms both the out-of-state wineries and the Michigan consumers interested in purchasing their wines. Additionally, plaintiffs Ray and Eleanor Heald allege that their ability to carry out their profession as wine journalists and wine critics is hampered by their inability to obtain many wines produced by out-of-state

[4]Article I § 8 cl. 3 of the United States Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; ..." The Supreme Court "long has recognized that this affirmative grant of authority to Congress also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy v. The Beer Institute,* 491 U.S. 324, 326 n.1 (1989).

wineries. For relief, they seek a declaratory judgment that it is unconstitutional for Michigan to prohibit out-of-state wineries from shipping wine directly to Michigan residents.

Defendants contend that Michigan's three-tier distribution system, and its different treatment of out-of-state and in-state wineries, are authorized under § 2 of the 21st Amendment.[5] Defendants argue that Michigan has a legitimate interest in ensuring that all wine sales, whether from in-state or out-of-state wineries, is carefully regulated. Defendants assert the present system ensures that all applicable taxes are collected and that minors do not have direct access to alcohol. Defendants further assert that Michigan wineries may act as retailers because they are subjected to extensive licensing requirements which cannot be applied, or practicably enforced, as to out-of-state wineries.

Defendants first argue that plaintiffs' complaint should be dismissed because plaintiffs lack standing to sue. This argument is easily disposed of. Standing is established by a showing of injury in fact, causation and redressability. See *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). In this case, plaintiffs have established each element. Plaintiffs' inability to obtain, or to sell, the wines they desire is a cognizable injury. The injury is caused by Michigan's prohibition of direct sales by out-of-state wineries to Michigan consumers. And the injury would be redressed by a ruling in plaintiffs' favor. Plaintiffs clearly have standing to assert this claim. See *Bridenbaugh,* 227 F.3d 849-50.

Defendants also argue that the court lacks jurisdiction over this matter under the Tax Injunction Act, 28 U.S.C. § 1341, which

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[5]U.S. Const. Amend. XXI, § 2 states: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."



states that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law ...." This statute "prohibits a federal district court, in most circumstances, from issuing an injunction enjoining the collection of state taxes ... [and] from issuing a declaratory judgment holding state tax laws unconstitutional." *California v. Grace Brethren Church,* 457 U.S. 393, 408 (1982). This statute does not apply in this case. Plaintiffs do not seek a declaration enjoining the collection of any state tax; they seek a declaration that Michigan's direct shipment law is unconstitutional. Plaintiffs have specifically indicated they are willing and able to pay any and all applicable taxes. The motion to dismiss the complaint for lack of subject matter jurisdiction on these grounds must be denied.

While the case law concerning direct shipment laws is sparse, the more persuasive decisions have found such laws to be constitutional.[6] In *House of York, Ltd. v. Ring.,* 322 F. Supp. 530 (S.D.N.Y. 1970), plaintiff was a Delaware beverage distributor that challenged a New York statute prohibiting the direct shipment of alcoholic beverages to New York residents. Among other things, plaintiff argued that the statute violated the Commerce Clause. In rejecting this argument, the court stated:

> A series of decisions by the Supreme Court rendered shortly after the ratification of [the 21st Amendment] made it abundantly clear that the

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[6]The court is aware of three contrary district court decisions. See *Bridenbaugh v. O'Bannon*, 78 F. Supp. 2d 828 (N.D. Ind. 1999), *rev'd Bridenbaugh v. Freeman-Wilson,* 227 F.3d 848 (7th Cir. 2000); *Swedenburg v. Kelly,* 2000 WL 1264285 (S.D.N.Y. 2000) (unpublished decision denying a Rule 12(b)(6) motion to dismiss); and *Dickerson v. Bailey,* 87 F. Supp. 691 (S.D. Tex. 2000) (granting summary judgment for plaintiffs where state statute prohibited direct shipment and personal importation of more than three gallons of wine).

> states were considered to have acquired plenary authority to deal with intoxicating beverages after importation ... [W]hile it is clear that the twenty-first amendment does not abrogate the Commerce Clause, the states have wide latitude in regulating liquors coming into, rather than through, the state, and such latitude encompasses the statute now before us.

*Id.* at 533, 535.

In *Bainbridge v. Bush*, 148 F. Supp. 2d 1306 (M.D. Fla. 2001), plaintiffs challenged Florida's direct shipment law. In all relevant respects, the statutory scheme at issue in *Bainbridge* is identical to Michigan's. Just as in Michigan, the Florida statute permits a Florida winery to obtain a vendor's license and to sell its products directly to Florida residents; however, such a license is not available to out-of-state wineries, which must incur the additional expense of selling their products through the three-tier distribution system. The court noted that this scheme "has the practical effect of preventing many small wineries from selling their wine in Florida ... because it is not cost-effective for the smaller out-of-state wineries to acquire a Florida wholesaler." *Id.* at 1311 n.7. The court found that the Florida statute violated the Commerce Clause because it "directly discriminates against out-of-state retailers and nondiscriminatory alternatives are available to serve the legitimate state interests ...." *Id.* at 1312.

Nonetheless, the court rejected plaintiffs' constitutional challenge and found the statute to be valid under § 2 of the 21st Amendment. The court noted that in a series of decisions the Supreme Court has indicated that under this amendment states have "virtually complete control" over the importation and distribution of alcohol; that state liquor statutes are presumptively valid; and that the three-tier distribution system is "unquestionably legitimate." *Id.* at 1310-1312, quoting *North*



*Dakota v. United States*, 495 U.S. 423, 431-32 (1990). While state liquor control laws are not immune from scrutiny, they generally are upheld so long as they implicate "'core concerns' of the twenty-first amendment, including temperance, raising revenue and 'ensuring orderly market conditions.'" *Id.* at 1313, quoting *North Dakota*, 495 U.S. at 432. The court found that the Florida statute met this test, as it sought to address "a serious threat to the public health, safety, and welfare; to state revenue collections; and to the economy of the state." *Id.* at 1308, quoting Fla. Stat. § 561.545 (legislative findings). The court concluded by stating:

> [T]he discriminatory nature of Florida's statutory scheme, when considered from the perspective of out-of-state wineries, violates the dormant commerce clause. However, because the Florida statutory scheme implicates the "core concerns" of the Twenty-First Amendment, it is a valid exercise of Florida's power even as applied to out-of-state wineries. ... In this regard, the numerous interests promoted by the Florida statutory scheme, including temperance, revenue protection, and the reduction of diversion and bootlegging, outweigh the minimal burden placed on interstate commerce.

*Id.* at 1315.

In *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), the Seventh Circuit reversed a district court decision finding an Indiana direct shipment statute unconstitutional. In *Bridenbaugh*, as in the present case, plaintiffs were wine collectors and connoisseurs, who complained that the direct shipment statute prevented them from obtaining wine from small out-of-state wineries which could not afford to, or chose not to, sell their products through the three-tier distribution system. Plaintiff Bridenbaugh, like the Healds in the present

case, also alleged that the direct shipment statute interfered with his ability to engage in his profession as a wine critic.

The district court found that the statute was unconstitutional because it violated the Commerce Clause by discriminating against out-of-state wineries in favor of in-state wineries. The district court further found that the statute did not promote temperance and that, therefore, the statute was not a proper exercise of power under the 21st Amendment. See *Id.* at 831 & 832 n.4 ("[T]emperance is the core purpose of the Twenty-First Amendment"; "[t]emperance is not the issue in the case now before this Court").

On appeal, the Seventh Circuit noted that the Indiana statute would be invalid under the Commerce Clause if it were directed at any consumer product other than alcoholic beverages. See *Bridenbaugh v. Freeman-Wilson,* 227 F.3d 848, 851 (7th Cir. 2000). The court also agreed that the statute "is hard to justify as a temperance measure." *Id.* Nonetheless, the appeals court reversed the judgment of the district court because the Indiana direct shipment law was a valid exercise of state authority under § 2 of the 21st Amendment. The court stated:

> Indiana Code § 7.1-5-11-1.5(a), like the statute in Bowman, regulates importation. And the shipments it regulates, direct shipments to consumers, are precisely the sort that prompted the Webb-Kenyon Act, the forefather of § 2. Section 2 thus authorizes I.C. § 7.1-5-11-1.5(a) unless the state has used its power to impose a discriminatory condition on importation, one that favors Indiana sources of alcoholic beverages over sources in other states, as Hawaii did in Bacchus. Plaintiffs contend that § 7.1-5-11-1.5(a) discriminates in this fashion, but we do not see how. Indiana insists that every drop of liquor pass



> through its three-tiered system and be subjected to taxation. Wine originating in California, France, Australia, or Indiana passes through the same three tiers and is subjected to the same taxes. Where's the functional discrimination?

*Id.* at 853. The court acknowledged that Indiana wineries are permitted to ship their wines directly to Indiana consumers, whereas out-of-state wineries are required to sell their wines through licensed wholesalers and retailers. See *Id.* at 851. However, the court rejected plaintiffs' contention that this scheme discriminates unfairly against out-of-state wineries. Noting that the 21st Amendment "empowers Indiana to control alcohol in ways that it cannot control cheese," the court found that the direct shipment law "channels [out-of-state] sales through Indiana permit-holders, enabling Indiana to collect its excise tax equally from in-state and out-of-state sellers. As the history of the twenty-first amendment confirms, this is precisely what § 2 is for." *Id.* at 851, 854.

The court believes that the decisions in *House of York*, *Bridenbaugh* and *Bainbridge* correctly concluded that direct shipment laws are a permissible exercise of state power under § 2 of the 21st Amendment. While the dormant Commerce Clause would prohibit states from burdening interstate commerce by applying such laws to any other products, the 21st Amendment directly authorizes the states "to control alcohol in ways that it cannot control cheese." *Bridenbaugh,* 227 F.3d at 851. The Supreme Court has specifically upheld the three-tier distribution system and has stated more than once that "within the area of its jurisdiction, the State has 'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system." *North Dakota v. United States,* 495 U.S. 423, 431 (1990), citing *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). See also *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 584-85 (1986)

(noting that while the 21st Amendment does not authorize a state to regulate liquor sales in other states, the amendment does give states "wide latitude to regulate the importation and distribution of liquor within their territories"); *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 712 (1984) (noting that § 2 "reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause"). The control is "virtually complete," and not "complete," because a state's actions under the 21st Amendment must further "core" concerns of that Amendment -- namely, "the interest of promoting temperance, ensuring orderly market conditions, and raising revenue." *North Dakota,* 495 U.S. at 432. These interests are not furthered -- and the 21st Amendment will not deflect a Commerce Clause challenge -- when, for example, a state exempts locally produced alcoholic beverages from a generally applicable liquor excise tax, thereby engaging in "mere economic protectionism." *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984). The Supreme Court has invalidated other state statutes as well, when the burden on interstate commerce is not justified by "core" 21st Amendment concerns. See *Healy v. The Beer Institute*, 491 U.S. 324 (1989) (invalidating price affirmation statute); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986) (same); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) (invalidating prohibition of liquor sales to departing international airline travelers).

The court is persuaded that Michigan's direct shipment law is a permitted exercise of state power under § 2 of the 21st Amendment. The measure cannot be characterized as "mere economic protectionism." The direct shipment law is one provision of a comprehensive system that regulates the flow of all alcoholic beverages into and within the State of Michigan. Out-of-state wineries are not prohibited from selling their products in Michigan; they simply must do so in a manner prescribed by Michigan's statutory scheme -- namely, by going



through a licensed wholesaler. The Michigan Legislature has chosen this path to ensure the collection of taxes from out-of-state wine manufacturers and to reduce the risk of alcohol falling into the hands of minors. The 21st Amendment gives it the power to do so.

For the reasons stated above,

IT IS ORDERED that plaintiffs' motion for summary judgment is denied.

IT IS FURTHER ORDERED that plaintiffs' requests for injunctive and declaratory relief are denied.

IT IS FURTHER ORDERED that defendants' motions to dismiss or for summary judgment due to lack of standing or for lack of subject matter jurisdiction are denied.

IT IS FURTHER ORDERED that defendants' motions for summary judgment on the merits are granted.

IT IS FURTHER ORDERED that the remaining motions are denied as moot.

S/S
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: 28 SEP 2001
Detroit, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELEANOR HEALD, et al.,

Plaintiffs, Civil Action No.
00-CV-71438-DT

vs. HON. BERNARD A. FRIEDMAN

JOHN ENGLER, et al.,

Defendants,

and

MICHIGAN BEER AND WINE
WHOLESALERS ASSOCIATION,
_____/

**JUDGMENT**

The court has granted defendants' motion for summary judgment and denied plaintiffs' motion for summary judgment. Accordingly,

IT IS ORDERED AND ADJUDGED that judgment be and is hereby granted for defendants and against plaintiffs. Costs to be permitted in accordance with law.

DAVID J. WEAVER
CLERK OF THE COURT

By: S/S
Deputy Clerk



Approved: S/S
BERNARD A. FRIEDMAN
U.S. DISTRICT JUDGE

28 SEP 2001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELEANOR HEALD, et al.,

Plaintiffs,

Civil Action No.
00-CV-71438-DT

vs.

HON. BERNARD A. FRIEDMAN

JOHN ENGLER, et al.,

Defendants,

and

MICHIGAN BEER AND WINE
WHOLESALERS ASSOCIATION,

Intervening Defendant.
_____/

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

This matter is presently before the court on plaintiffs' motion for reconsideration of the court's opinion and order granting summary judgment for defendants. The motion is denied because plaintiffs have not "demonstrate[d] a palpable defect by which the court and the parties have been misled [and] . . . that correcting the defect will result in a different disposition of the case." E.D. Mich. LR 7.1(g)(3).

The bottom line in this case is that the 21st Amendment authorizes states to regulate the flow of alcohol within their borders. The three-tier distribution system is a proper exercise



of that constitutional authority, despite the fact that such a system places a minor burden on interstate commerce. The court did not address the parties' cross motions to strike various affidavits and other evidence because the court did not consider the challenged evidence in deciding the summary judgment motions. In effect, the court denied the cross motions to strike as moot. This case turns on largely legal questions, not factual disputes. Accordingly,

IT IS ORDERED that plaintiffs' motion for reconsideration is denied.

S/S
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: NOV 05 2001
Detroit, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELEANOR HEALD, et al.,

Plaintiffs,

Civil Action No.
00-CV-71438-DT

vs.

HON. BERNARD A. FRIEDMAN

JOHN ENGLER, et al.,

Defendants,

and

MICHIGAN BEER AND WINE
WHOLESALERS ASSOCIATION,

Intervening Defendant.
_____/

JUDGMENT

In accordance with the Sixth Circuit's order of remand dated August 28, 2003,

IT IS ORDERED AND ADJUDGED that judgment be and is hereby granted for plaintiffs and against defendants. Costs to be permitted in accordance with law.

DAVID J. WEAVER
CLERK OF COURT

By: S/S
Deputy Clerk



Approved:_____
BERNARD A. FRIEDMAN
U.S. DISTRICT JUDGE

SEP 05 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELEANOR HEALD, et al.,

Plaintiffs, Civil Action No.
00-CV-71438-DT

vs.

HON. BERNARD A. FRIEDMAN

JOHN ENGLER, et al.,

Defendants,

and

MICHIGAN BEER AND WINE
WHOLESALERS ASSOCIATION,

Intervening Defendant.
_____/

ORDER GRANTING DEFENDANT'S
MOTION FOR RELIEF FROM JUDGMENT

Defendant has filed a motion, in which intervening defendant joins, requesting that the court vacate its September 5, 2003, judgment. Defendant correctly notes that the judgment was filed before the court of appeals' mandate was issued. Accordingly,

IT IS ORDERED that defendant's motion for relief from judgment is granted, and the court's September 5, 2003, judgment is vacated.



S/S
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: Sep 24 2003
Detroit, Michigan

The **Webb-Kenyon Act** provides:

§ 122. Shipments into States for possession or sale in violation of State law

The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

27 USC 122.



**436.1109 Definitions; M to O.**

Sec. 109. (1) "Manufacturer" means a person engaged in the manufacture of alcoholic liquor, including, but not limited to, a distiller, a rectifier, a wine maker, and a brewer.

(2) "Micro brewer" means a brewer that produces in total less than 30,000 barrels of beer per year and that may sell the beer produced to consumers at the licensed brewery premises for consumption on or off the licensed brewery premises. In determining the 30,000-barrel threshold, all brands and labels of a brewer, whether brewed in this state or outside this state, shall be combined and all facilities for the production of beer that are owned or controlled by the same person shall be treated as a single facility.

(3) "Minor" means a person less than 21 years of age.

(4) "Mixed spirit drink" means a drink produced and packaged or sold by a mixed spirit drink manufacturer or an outstate seller of mixed spirit drink which contains 10% or less alcohol by volume consisting of distilled spirits mixed with nonalcoholic beverages or flavoring or coloring materials and which may also contain 1 or more of the following:

(a) Water.

(b) Fruit juices.

(c) Fruit adjuncts.

(d) Sugar.

(e) Carbon dioxide.

(f) Preservatives.

(5) "Mixed spirit drink manufacturer" means any person licensed under this act to manufacture mixed spirit drink in this state and to sell mixed spirit drink to a wholesaler. For purposes of rules promulgated by the commission, a mixed spirit drink manufacturer shall be treated as a wine manufacturer but is subject to the rules applicable to spirits for purposes of manufacturing and labeling.

(6) "Mixed wine drink" means a drink or similar product marketed as a wine cooler and containing less than 7% alcohol by volume, consisting of wine and plain, sparkling, or

carbonated water, and containing any 1 or more of the following:

(a) Nonalcoholic beverages.

(b) Flavoring.

(c) Coloring materials.

(d) Fruit juices.

(e) Fruit adjuncts.

(f) Sugar.

(g) Carbon dioxide.

(h) Preservatives.

(7) "Outstate seller of beer" means a person licensed by the commission to sell beer which has not been manufactured in this state to a wholesaler in this state in accordance with rules promulgated by the commission.

(8) "Outstate seller of mixed spirit drink" means a person licensed by the commission to sell mixed spirit drink which has not been manufactured in this state to a wholesaler in this state in accordance with rules promulgated by the commission. For purposes of rules promulgated by the commission, an outstate seller of mixed spirit drink shall be treated as an outstate seller of wine but is subject to the rules applicable to spirits for purposes of manufacturing and labeling.

(9) "Outstate seller of wine" means a person licensed by the commission to sell wine which has not been manufactured in this state to a wholesaler in this state in accordance with rules promulgated by the commission and to sell sacramental wine as provided in section 301.



**436.1111 Definitions; P to S.**

Sec. 111. (1) "Person" means an individual, firm, partnership, limited partnership, association, limited liability company, or corporation.

(2) "Primary source of supply" means, in the case of domestic spirits, the distiller, producer, owner of the commodity at the time it becomes a marketable product, or bottler, or the exclusive agent of any such person and, in the case of spirits imported into the United States, either the foreign distiller, producer, owner of the bottler, or the prime importer for, or the exclusive agent in the United States of, the foreign distiller, producer, owner, or the bottler.

(3) "Professional account" means an account established for a person by a class C licensee or tavern licensee whose major business is the sale of food, by which the licensee extends credit to the person for not more than 30 days.

(4) "Residence" means the premises in which a person resides permanently.

(5) "Retailer" means a person licensed by the commission who sells to the consumer in accordance with rules promulgated by the commission.

(6) "Sacramental wine" means wine containing not more than 24% of alcohol by volume which is used for sacramental purposes.

(7) "Sale" includes the exchange, barter, traffic, furnishing, or giving away of alcoholic liquor. In the case of a sale in which a shipment or delivery of alcoholic liquor is made by a common or other carrier, the sale of the alcoholic liquor is considered to be made in the county within which the delivery of the alcoholic liquor is made by that carrier to the consignee or his or her agent or employee, and venue for the prosecution for that sale may be in the county or city where the seller resides or from which the shipment is made or at the place of delivery.

(8) "School" includes buildings used for school purposes to provide instruction to children in grades kindergarten through 12, when that instruction is provided by a

public, private, denominational, or parochial school, except those buildings used primarily for adult education or college extension courses. School does not include a proprietary trade or occupational school.

(9) "Small wine maker" means a wine maker manufacturing or bottling not more than 50,000 gallons of wine in 1 calendar year.

(10) "Special license" means a contract between the commission and the special licensee granting authority to that licensee to sell beer, wine, mixed spirit drink, or spirits. The license shall be granted only to such persons and such organization and for such period of time as the commission shall determine so long as the person or organization is able to demonstrate an existence separate from an affiliated umbrella organization. If such an existence is demonstrated, the commission shall not deny a special license solely by the applicant's affiliation with an organization that is also eligible for a special license.

(11) "Specially designated distributor" means a person engaged in an established business licensed by the commission to distribute spirits and mixed spirit drink in the original package for the commission for consumption off the premises.

(12) "Specially designated merchant" means a person to whom the commission grants a license to sell beer or wine, or both, at retail for consumption off the licensed premises.

(13) "Spirits" means a beverage that contains alcohol obtained by distillation, mixed with potable water or other substances, or both, in solution, and includes wine containing an alcoholic content of more than 21% by volume, except sacramental wine and mixed spirit drink.

(14) "State liquor store" means a store established by the commission under this act for the sale of spirits in the original package for consumption off the premises.

(15) "Supplier of spirits" means a vendor of spirits, a manufacturer of spirits, or a primary source of supply.



**436.1113 Definitions; T to W.**

Sec. 113. (1) "Tavern" means any place licensed to sell at retail beer and wine for consumption on the premises only.

(2) "Vehicle" means any means of transportation by land, by water, or by air.

(3) "Vendor" means a person licensed by the commission to sell alcoholic liquor.

(4) "Vendor of spirits" means a person selling spirits to the commission.

(5) "Warehouse" means a premises or place primarily constructed, used, or provided with facilities for the storage in transit or other temporary storage of perishable goods or for the conduct of a warehousing business, or for both.

(6) "Warehouser" means a licensee authorized by the commission to store alcoholic beverages, but prohibited from making sales or deliveries to retailers unless the licensee is also the holder of a wholesaler or manufacturer license issued by the commission.

(7) "Wholesaler" means a person who sells beer, wine, or mixed spirit drink only to retailers or other licensees, and who sells sacramental wine as provided in section 301.

(8) "Wine" means the product made by the normal alcoholic fermentation of the juice of sound, ripe grapes, or any other fruit with the usual cellar treatment, and containing not more than 21% of alcohol by volume, including fermented fruit juices other than grapes and mixed wine drinks.

(9) "Wine maker" means any person licensed by the commission to manufacture wine and sell, at wholesale or retail, wine manufactured by that person.

**436.1203 Sale, delivery, or importation of alcoholic liquor; original purchase and importation into state of spirits for sale, use, storage, or distribution; requirements; exceptions.**

Sec. 203. (1) Except as provided in this section and section 301, a sale, delivery, or importation of alcoholic liquor, including alcoholic liquor for personal use, shall not be made

in this state unless the sale, delivery, or importation is made by the commission, the commission's authorized agent or distributor, an authorized distribution agent approved by order of the commission, a person licensed by the commission, or by prior written order of the commission.

(2) For purposes of subsection (1), the sale, delivery, or importation of alcoholic liquor includes, but is not limited to, the sale, delivery, or importation of alcoholic liquor transacted or caused to be transacted by means of any mail order, internet, telephone, computer, device, or other electronic means. Subject to subsection (3), if a retail sale, delivery, or importation of alcoholic liquor occurs by any such means, the retailer must comply with all of the following:

(a) Be appropriately licensed under the laws of this state.

(b) Pay any applicable taxes to the commission.

(c) Comply with all prohibitions of the laws of this state including, but not limited to, sales to minors.

(d) Verify the age of the individual placing the order by obtaining from him or her an affirmation that he or she is of legal age to purchase alcoholic liquor. The person receiving and accepting the order shall record the name, address, date of birth, and telephone number of the person placing the order on the order form or other verifiable record of a type and generated in a manner approved by the commission.

(e) Upon request of the commission, make available to the commission any document used to verify the age of the individual ordering the alcoholic liquor from the retail seller.

(f) Stamp, print, or label on the outside of the shipping container language that clearly establishes in a prominent fashion that the package contains alcoholic liquor and that the recipient at the time of the delivery is required to provide identification verifying his or her age along with a signature.

(g) Place a label on the top panel of the shipping container containing the name and address of the individual placing the order and the name of the designated recipient, if any.



(3) Notwithstanding subsection (2), in the case of a retail sale, delivery, or importation of alcoholic liquor occurring by any means described in subsection (2), a person taking the order on behalf of the retailer must comply with subsection (2)(c) through (g).

(4) The person who delivers the alcoholic liquor shall verify that the individual accepting delivery is of legal age and is either the individual who placed the order or the designated recipient residing at the same address or is otherwise authorized through a rule promulgated under this act by the commission to receive alcoholic liquor under this section. If the delivery person, after a diligent inquiry, determines that the purchaser or designated recipient is not of legal age, the delivery person shall return the alcoholic liquor to the retailer. A delivery person who returns alcoholic liquor to the retailer due to inability to obtain the purchaser's or designated recipient's legal age is not liable for any damages suffered by the purchaser or retailer.

(5) All spirits for sale, use, storage, or distribution in this state, shall originally be purchased by and imported into the state by the commission, or by prior written authority of the commission.

(6) This section does not apply in the case of an alcoholic liquor brought into this state for personal or household use in an amount permitted by federal law by a person of legal age to purchase alcoholic liquor at the time of reentry into this state from without the territorial limits of the United States if the person has been outside the territorial limits of the United States for more than 48 hours and has not brought alcoholic liquor into the United States during the preceding 30 days.

(7) A person who is of legal age to purchase alcoholic liquor may do either of the following in relation to alcoholic liquor that contains less than 21% alcohol by volume.

(a) Personally transport from another state, once in a 24-hour period, not more than 312 ounces of alcoholic liquor for that person's personal use, notwithstanding subsection (1).

(b) Ship or import from another state alcoholic liquor for that person's personal use so long as that personal importation is done in compliance with subsection (1).

(8) As used in this section:

(a) "Computer" means any connected, directly interoperable or interactive device, equipment, or facility that uses a computer program or other instructions to perform specific operations including logical, arithmetic, or memory functions with or on computer data or a computer program and that can store, retrieve, alter, or communicate the results of the operations to a person, computer program, computer, computer system, or computer network.

(b) "Computer network" means the interconnection of hardwire or wireless communication lines with a computer through remote terminals, or a complex consisting of 2 or more interconnected computers.

(c) "Computer program" means a series of internal or external instructions communicated in a form acceptable to a computer that directs the functioning of a computer, computer system, or computer network in a manner designed to provide or produce products or results from the computer, computer system, or computer network.

(d) "Computer system" means a set of related, connected or unconnected, computer equipment, devices, software, or hardware.

(e) "Device" includes, but is not limited to, an electronic, magnetic, electrochemical, biochemical, hydraulic, optical, or organic object that performs input, output, or storage functions by the manipulation of electronic, magnetic, or other impulses.

(f) "Diligent inquiry" means a diligent good faith effort to determine the age of a person, which includes at least an examination of an official Michigan operator's or chauffeur's license, an official Michigan personal identification card, or any other bona fide picture identification which establishes the identify and age of the person.



**436.1537 Classes of vendors permitted to sell alcoholic liquors at retail; sale of wine by wine maker; wine tastings.**

Sec. 537. (1) The following classes of vendors may sell alcoholic liquors at retail as provided in this section:

(a) Taverns where beer and wine may be sold for consumption on the premises only.

(b) Class C license where beer, wine, mixed spirit drink, and spirits may be sold for consumption on the premises.

(c) Clubs where beer, wine, mixed spirit drink, and spirits may be sold for consumption on the premises only to bona fide members where consumption is limited to these members and their bona fide guests, who have attained the age of 21 years.

(d) Hotels of class A where beer and wine may be sold for consumption on the premises and in the rooms of bona fide registered guests. Hotels of class B where beer, wine, mixed spirit drink, and spirits may be sold for consumption on the premises and in the rooms of bona fide registered guests.

(e) Specially designated merchants, where beer and wine may be sold for consumption off the premises only.

(f) Specially designated distributors where spirits and mixed spirit drink may be sold for consumption off the premises only.

(g) Special licenses where beer and wine or beer, wine, mixed spirit drink, and spirits may be sold for consumption on the premises only.

(h) Dining cars or other railroad or Pullman cars, watercraft, or aircraft, where alcoholic liquor may be sold for consumption on the premises only, subject to rules promulgated by the commission.

(i) Brewpubs where beer manufactured on the premises by the licensee may be sold for consumption on or off the premises by any of the following licensees:

(i) Class C.

(ii) Tavern.

(iii) Class A hotel.

(iv) Class B hotel.

(j) Micro brewers where beer produced by the micro brewer may be sold to a consumer for consumption on or off the brewery premises.

(k) Class G-1 license where beer, wine, mixed spirit drink, and spirits may be sold for consumption on the premises only to members required to pay an annual membership fee and consumption is limited to these members and their bona fide guests.

(l) Class G-2 license where beer and wine may be sold for consumption on the premises only to members required to pay an annual membership fee and consumption is limited to these members and their bona fide guests.

(2) A wine maker may sell wine made by that wine maker in a restaurant for consumption on or off the premises if the restaurant is owned by the wine maker or operated by another person under an agreement approved by the commission and located on the premises where the wine maker is licensed.

(3) A wine maker, with the prior written approval of the commission, may conduct wine tastings of wines made by that wine maker and may sell the wine made by that wine maker for consumption off the premises at a location other than the premises where the wine maker is licensed to manufacture wine, under the following conditions:

(a) The premises upon which the wine tasting occurs conforms to local and state sanitation requirements.

(b) Payment of a $100.00 fee per location is made to the commission.

(c) The wine tasting locations shall be considered licensed premises.

(d) Wine tasting does not take place between the hours of 2 a.m. and 7 a.m. Monday through Saturday, or between 2 a.m. and 12 noon on Sunday.

(e) The premises and the licensee comply with and are subject to all applicable rules promulgated by the commission.



**436.1603 Interest in business of other vendor prohibited; placing certain stock in portfolio under arrangement of trust agreement; issuance and sale of participating shares within state prohibited; sale of brandy by manufacturer; conditions; interest of brewpub in other locations.**

Sec. 603. (1) Except as provided in subsection (6) and section 605, a manufacturer, mixed spirit drink manufacturer, warehouser, wholesaler, outstate seller of beer, outstate seller of wine, outstate seller of mixed spirit drink, or vendor of spirits shall not have any financial interest, directly or indirectly, in the establishment, maintenance, operation, or promotion of the business of any other vendor.

(2) Except as provided in subsection (6) and section 605, a manufacturer, mixed spirit drink manufacturer, warehouser, wholesaler, outstate seller of beer, outstate seller of wine, outstate seller of mixed spirit drink, or vendor of spirits or a stockholder of a manufacturer, mixed spirit drink manufacturer, warehouser, wholesaler, outstate seller of beer, outstate seller of wine, outstate seller of mixed spirit drink, or vendor of spirits shall not have an interest by ownership in fee, leasehold, mortgage, or otherwise, directly or indirectly, in the establishment, maintenance, operation, or promotion of the business of any other vendor.

(3) Except as provided in subsection (6) and section 605, a manufacturer, mixed spirit drink manufacturer, warehouser, wholesaler, outstate seller of beer, outstate seller of wine, outstate seller of mixed spirit drink, or vendor of spirits shall not have an interest directly or indirectly by interlocking directors in a corporation or by interlocking stock ownership in a corporation in the establishment, maintenance, operation, or promotion of the business of any other vendor.

(4) Except as provided in subsection (6) and section 605, a person shall not buy the stocks of a manufacturer, mixed spirit drink manufacturer, warehouser, wholesaler, outstate seller of beer, outstate seller of wine, outstate seller of mixed spirit drink, or vendor of spirits and place the stock in any

portfolio under an arrangement, written trust agreement, or form of investment trust agreement and issue participating shares based upon the portfolio, trust agreement, or investment trust agreement, and sell the participating shares within this state.

(5) The commission may approve a brandy manufacturer to sell brandy made by that brandy manufacturer in a restaurant for consumption on or off the premises if the restaurant is owned by the brandy manufacturer or operated by another person under an agreement approved by the commission and is located on the premises where the brandy manufacturer is licensed. Brandy sold for consumption off the premises under this subsection shall be sold at the uniform price established by the commission.

(6) A brewpub may have an interest in up to 2 other brewpubs so long as the combined production of all the locations in which the brewpub has an interest does not exceed 5,000 barrels of beer per calendar year.

**436.1605 Acquisition, development, sale, lease, financing, maintenance, operation, or promotion by brewer of real property occupied or to be occupied by another vendor; conditions; denial or approval of arrangement or contract; review; denial, revocation, or suspension of license; wholesaler as party to arrangement or contract prohibited; acquisition, development, sale, lease, financing, maintenance, operation, or promotion of condominium project or unit; exception.**

Sec. 605. (1) A brewer, or the parent company, a subsidiary or an affiliate of a brewer which parent company, subsidiary, or affiliate is located in this state may acquire, develop, sell, lease, finance, maintain, operate, or promote real property occupied or to be occupied by another vendor, except a wholesaler, if all of the following exist:

(a) The brewer has received written approval of the commission before entering into any arrangement or contract between the parties regarding the real property.



(b) The legislative body of the city, village, or township where the property is located certifies to the commission that the real property is in an urban, commercial, or community redevelopment area and is designated as such by a state or federal agency.

(c) Any arrangement or contract entered into between the brewer, its parent company, subsidiary, or affiliate and another vendor shall not directly or indirectly influence or control the brand of alcoholic liquor sold or to be sold by the vendor and shall only be concerned with real property.

(2) The commission may deny or approve an arrangement or contract to be entered into under this section. In denying or approving an arrangement or contract, the commission shall consider all of the following:

(a) That the arrangement or contract to be entered into is concerned only with real property.

(b) That the certification required under subsection (1)(b) has been received by the commission.

(c) That the arrangement or contract does not violate this act or the rules promulgated under this act.

(3) The commission may review any arrangement or contract under this section at the time that 1 of the parties to the arrangement or contract applies for or renews a license. The commission may deny, revoke, or suspend the license of a party to the arrangement or contract if the commission finds that the party to the arrangement or contract has violated this act or the rules promulgated under this act.

(4) Except as otherwise provided in subsection (5), a wholesaler shall not be a party to, directly or indirectly, an arrangement or contract under this section.

(5) A manufacturer, mixed spirit drink manufacturer, warehouser, wholesaler, authorized distribution agent, outstate seller of beer, outstate seller of wine, outstate seller of mixed spirit drink, or vendor of spirits may acquire, develop, sell, lease, finance, maintain, operate, or promote a condominium project or own a condominium unit as its sole property, under the condominium act, 1978 PA 59, MCL 559.101 to 559.275,

if that condominium unit is not the licensed premises owned separately by a retailer and if all of the following apply:

(a) Condominium assessments in the condominium project are based on the proportional area each condominium unit has to the total area.

(b) A condominium unit operating as a licensed premises operates under a separate name from the condominium project except that cooperative advertising shall be permitted among owners of condominium units for the purpose of promoting the condominium project if the name of a brand or brands of an alcoholic liquor is not mentioned in the advertising.

(c) Ownership of a condominium unit and participation in a condominium association under this section is not considered a financial interest, interest by ownership, or interest by interlocking directors on stock ownership prohibited by section 603.

(d) A retailer separately owning a separate condominium unit as sole property does not directly purchase alcoholic liquor from the manufacturer, warehouser, wholesaler, outstate seller of mixed spirit drink, or vendor of spirits who owns, leases, maintains, finances, or operates the condominium project.

(e) A wholesaler who has a direct or indirect interest in a condominium unit in which a retailer is located does not sell alcoholic liquor to any licensed retail business in which that retailer, or any person having an ownership interest in that retailer, has an ownership interest; and, a retail licensed business in which that retailer, or any person having an ownership interest in that retailer, has an ownership interest does not purchase alcoholic liquor from a wholesaler who has a direct or indirect interest in a condominium or condominium unit in which that retailer is located.

(f) A retailer acquiring a separate condominium unit as sole property pays the fair market value for the unit.

(6) Subsection (5) does not apply to a manufacturer, mixed spirit drink manufacturer, warehouser, wholesaler,



authorized distribution agent, outstate seller of beer, outstate seller of wine, outstate seller of mixed spirit drink, or vendor of spirits with a direct or indirect interest in a license under the Michigan gaming control and revenue act, the Initiated Law of 1996, MCL 432.201 to 432.216. Subsection (5) does not prohibit a direct physical connection between a condominium unit which is the licensed premises and a condominium unit which is not the licensed premises.

**436.1607 Eligibility for license as specially designated merchant or specially designated distributor; prohibitions; brewer as specially designated merchant; brewery hospitality room; sales or deliveries by wholesaler.**

Sec. 607. (1) Except as provided in section 537(2), a warehouser, mixed spirit drink manufacturer, wholesaler, outstate seller of beer, outstate seller of wine, outstate seller of mixed spirit drink, or vendor of spirits shall not be licensed as a specially designated merchant or a specially designated distributor or permitted to sell or deliver to the consumer any quantity of alcoholic liquor at retail.

(2) A specially designated distributor or specially designated merchant or any other retailer shall not hold a mixed spirit drink manufacturer, wholesale, warehouse, outstate seller of beer, outstate seller of mixed spirit drink, or outstate seller of wine license.

(3) A brewer, warehouser, or wholesaler shall not be licensed as a specially designated merchant, except for brewers who manufacture less than 200,000 barrels of beer per year. This subsection shall not affect the operation of a brewery hospitality room.

(4) A wholesaler may sell or deliver beer and alcoholic liquor to hospitals, military establishments, governments of federal Indian reservations, and churches requiring sacramental wines and may sell to the wholesaler's own employees to a limit of 2 cases of 24 12-ounce units or its equivalent of malt beverage per week, or 1 case of 12 1-liter units or its equivalent of wine or mixed spirit drink per week.

**436.1701 Selling or furnishing alcoholic liquor to person less than 21 years of age; failure to make diligent inquiry; misdemeanor; signs; consumption of alcoholic liquor as cause of death or injury; felony; enforcement against licensee; consent of parent or guardian in undercover operation; defense in action for violation; report; definitions.**

Sec. 701. (1) Alcoholic liquor shall not be sold or furnished to a minor. Except as otherwise provided in subsection (2) and subject to subsections (4), (5), and (6), a person who knowingly sells or furnishes alcoholic liquor to a minor, or who fails to make diligent inquiry as to whether the person is a minor, is guilty of a misdemeanor. A retail licensee or a retail licensee's clerk, agent, or employee who violates this subsection shall be punished in the manner provided for licensees in section 909, except that if the violation is the result of an undercover operation in which the minor received alcoholic liquor under the direction of the state police, the commission, or a local police agency as part of an enforcement action, the retail licensee's clerk, agent, or employee is responsible for a state civil infraction and may be ordered to pay a civil fine of not more than $100.00. Except as otherwise provided in subsection (2), a person who is not a retail licensee or a retail licensee's clerk, agent, or employee and who violates this subsection is guilty of a misdemeanor punishable by a fine of not more than $1,000.00 and imprisonment for not more than 60 days for a first offense, a fine of not more than $2,500.00 and imprisonment for not more than 90 days for a second or subsequent offense, and may be ordered to perform community service. A suitable sign describing the content of this section and the penalties for its violation shall be posted in a conspicuous place in each room where alcoholic liquor is sold. The signs shall be approved and furnished by the commission.

(2) A person who is not a retail licensee or the retail licensee's clerk, agent, or employee and who violates



subsection (1) is guilty of a felony, punishable by imprisonment for not more than 10 years or a fine of not more than $5,000.00, or both, if the subsequent consumption of the alcoholic liquor by the minor is a direct and substantial cause of that person's death or an accidental injury that causes that person's death.

(3) If a violation occurs in an establishment that is licensed by the commission for consumption of alcoholic liquor on the licensed premises, a person who is a licensee or the clerk, agent, or employee of a licensee shall not be charged with a violation of subsection (1) or section 801(2) unless the licensee or the clerk, agent, or employee of the licensee knew or should have reasonably known with the exercise of due diligence that a person less than 21 years of age possessed or consumed alcoholic liquor on the licensed premises and the licensee or clerk, agent, or employee of the licensee failed to take immediate corrective action.

(4) If the enforcing agency involved in the violation is the state police or a local police agency, a licensee shall not be charged with a violation of subsection (1) or section 801(2) unless all of the following occur, if applicable:

(a) Enforcement action is taken against the minor who purchased or attempted to purchase, consumed or attempted to consume, or possessed or attempted to possess alcoholic liquor.

(b) Enforcement action is taken under this section against the person 21 years of age or older who is not the retail licensee or the retail licensee's clerk, agent, or employee who sold or furnished the alcoholic liquor to the minor.

(c) Enforcement action under this section is taken against the clerk, agent, or employee who directly sold or furnished alcoholic liquor to the minor.

(5) If the enforcing agency is the commission and an appearance ticket or civil infraction citation has not been issued, then the commission shall recommend to a local law enforcement agency that enforcement action be taken against a violator of this section or section 703 who is not a licensee. However, subsection (4) does not apply if the minor against

whom enforcement action is taken under section 703, the clerk, agent, or employee of the licensee who directly sold or furnished alcoholic liquor to the minor, or the person 21 years of age or older who sold or furnished alcoholic liquor to the minor is not alive or is not present in this state at the time the licensee is charged. Subsection (4)(a) does not apply under either of the following circumstances:

(a) The violation of subsection (1) is the result of an undercover operation in which the minor purchased or received alcoholic liquor under the direction of the person's employer and with the prior approval of the local prosecutor's office as part of an employer-sponsored internal enforcement action.

(b) The violation of subsection (1) is the result of an undercover operation in which the minor purchased or received alcoholic liquor under the direction of the state police, the commission, or a local police agency as part of an enforcement action.

(6) Any initial or contemporaneous purchase or receipt of alcoholic liquor by the minor under subsection (5)(a) or (b) must have been under the direction of the state police, the commission, or the local police agency and must have been part of the undercover operation.

(7) If a minor participates in an undercover operation in which the minor is to purchase or receive alcoholic liquor under the supervision of a law enforcement agency, his or her parents or legal guardian shall consent to the participation if that person is less than 18 years of age.

(8) In an action for the violation of this section, proof that the defendant or the defendant's agent or employee demanded and was shown, before furnishing alcoholic liquor to a minor, a motor vehicle operator's or chauffeur's license or a registration certificate issued by the federal selective service, or other bona fide documentary evidence of the age and identity of that person, shall be a defense to an action brought under this section.

(9) The commission shall provide, on an annual basis, a written report to the department of state police as to the number



of actions heard by the commission involving violations of this section and section 801(2). The report shall include the disposition of each action and contain figures representing the following categories:

(a) Decoy operations.

(b) Off-premises violations.

(c) On-premises violations.

(d) Repeat offenses within the 3 years preceding the date of that report.

(10) As used in this section:

(a) "Corrective action" means action taken by a licensee or a clerk, agent, or employee of a licensee designed to prevent a minor from further possessing or consuming alcoholic liquor on the licensed premises. Corrective action includes, but is not limited to, contacting a law enforcement agency and ejecting the minor and any other person suspected of aiding and abetting the minor.

(b) "Diligent inquiry" means a diligent good faith effort to determine the age of a person, which includes at least an examination of an official Michigan operator's or chauffeur's license, an official Michigan personal identification card, or any other bona fide picture identification which establishes the identity and age of the person.

**436.1801 Granting or renewal of license; surety; selling, furnishing, or giving alcoholic liquor to minor or to person visibly intoxicated; right of action for damage or personal injury; actual damages; institution of action; notice; survival of action; general reputation as evidence of relation; separate actions by parents; commencement of action against retail licensee; indemnification; defenses available to licensee; rebuttable presumption; prohibited causes of action; section as exclusive remedy for money damages against licensee; civil action subject to revised judicature act.**

Sec. 801. (1) Except as otherwise provided in this act, before the approval and granting, or renewal, of a license, the

following licensees or applicants for that license shall make, execute, and deliver to the commission a bond executed by a surety company authorized to do business in the state or, in the discretion of the commission, by approved personal surety running to the people of the state, in the following amounts:

(a) A manufacturer of beer, a manufacturer of wine, a mixed spirit drink manufacturer, an outstate seller of beer, an outstate seller of mixed spirit drink, and an outstate seller of wine, a bond in an amount equal to 1/12 of the total beer, mixed spirit drink, or wine excise taxes paid to the state in the last calendar year or a bond in the sum of $1,000.00, whichever is greater, for the faithful performance of the conditions of the license issued and for compliance with this act. A surety shall not cancel a bond issued under this subdivision except upon 30 days' written notice to the commission.

(b) A special license authorizing the sale of beer, mixed spirit drink, wine, or spirits for consumption on the premises, a bond in the sum of $1,000.00. A bond issued under this subdivision shall remain in effect for 60 days after the expiration of the special license. A bond is not required for a church or school.

(2) A retail licensee shall not directly, individually, or by a clerk, agent, or servant sell, furnish, or give alcoholic liquor to a minor except as otherwise provided in this act. A retail licensee shall not directly or indirectly, individually or by a clerk, agent, or servant sell, furnish, or give alcoholic liquor to a person who is visibly intoxicated.

(3) Except as otherwise provided in this section, an individual who suffers damage or who is personally injured by a minor or visibly intoxicated person by reason of the unlawful selling, giving, or furnishing of alcoholic liquor to the minor or visibly intoxicated person, if the unlawful sale is proven to be a proximate cause of the damage, injury, or death, or the spouse, child, parent, or guardian of that individual, shall have a right of action in his or her name against the person who by selling, giving, or furnishing the alcoholic liquor has caused or contributed to the intoxication of the person or who has caused



or contributed to the damage, injury, or death. In an action pursuant to this section, the plaintiff shall have the right to recover actual damages in a sum of not less than $50.00 in each case in which the court or jury determines that intoxication was a proximate cause of the damage, injury, or death.

(4) An action under this section shall be instituted within 2 years after the injury or death. A plaintiff seeking damages under this section shall give written notice to all defendants within 120 days after entering an attorney-client relationship for the purpose of pursuing a claim under this section. Failure to give written notice within the time specified shall be grounds for dismissal of a claim as to any defendants that did not receive that notice unless sufficient information for determining that a retail licensee might be liable under this section was not known and could not reasonably have been known within the 120 days. In the event of the death of either party, the right of action under this section shall survive to or against his or her personal representative. In each action by a husband, wife, child, or parent, the general reputation of the relation of husband and wife or parent and child shall be prima facie evidence of the relation, and the amount recovered by either the husband, wife, parent, or child shall be his or her sole and separate property. The damages, together with the costs of the action, shall be recovered in an action under this section. If the parents of the individual who suffered damage or who was personally injured are entitled to damages under this section, the father and mother may sue separately, but recovery by 1 is a bar to action by the other.

(5) An action under this section against a retail licensee shall not be commenced unless the minor or the alleged intoxicated person is a named defendant in the action and is retained in the action until the litigation is concluded by trial or settlement.

(6) Any licensee subject to the provisions of subsection (3) regarding the unlawful selling, furnishing, or giving of alcoholic liquor to a visibly intoxicated person shall have the right to full indemnification from the alleged visibly

intoxicated person for all damages awarded against the licensee.

(7) All defenses of the alleged visibly intoxicated person or the minor shall be available to the licensee. In an action alleging the unlawful sale of alcoholic liquor to a minor, proof that the defendant retail licensee or the defendant's agent or employee demanded and was shown a Michigan driver license or official state personal identification card, appearing to be genuine and showing that the minor was at least 21 years of age, shall be a defense to the action.

(8) There shall be a rebuttable presumption that a retail licensee, other than the retail licensee who last sold, gave, or furnished alcoholic liquor to the minor or the visibly intoxicated person, has not committed any act giving rise to a cause of action under subsection (3).

(9) The alleged visibly intoxicated person shall not have a cause of action pursuant to this section and a person shall not have a cause of action pursuant to this section for the loss of financial support, services, gifts, parental training, guidance, love, society, or companionship of the alleged visibly intoxicated person.

(10) This section provides the exclusive remedy for money damages against a licensee arising out of the selling, giving, or furnishing of alcoholic liquor.

(11) Except as otherwise provided for under this section and section 815, a civil action under subsection (3) against a retail licensee shall be subject to the revised judicature act of 1961, 1961 PA 236, MCL 600.101 to 600.9947.

**436.1903 Suspension or revocation of license; violation of act or rules; penalty; disposition; hearing; procedure, fee; right of appeal; institution of criminal prosecutions; defense; rules; appointment of agents to hear violation cases; authority and responsibility; ineligibility of designated agent for appointment to commission.**

Sec. 903. (1) The commission or any commissioner or duly authorized agent of the commission designated by the



chairperson of the commission, upon due notice and proper hearing, may suspend or revoke any license upon a violation of this act or any of the rules promulgated by the commission under this act. The commission or any commissioner or duly authorized agent of the commission designated by the chairperson of the commission, may assess a penalty of not more than $300.00 for each violation of this act or rules promulgated under this act, or not more than $1,000.00 for each violation of section 801(2), in addition to or in lieu of revocation or suspension of the license, which penalty shall be paid to the commission and deposited with the state treasurer and shall be credited to the general fund of the state. The commission shall hold a hearing and order the suspension or revocation of a license if the licensee has been found liable for 3 or more separate violations of section 801(2) which violations occurred on different occasions within a 24-month period unless such violations for the sale, furnishing, or giving alcoholic liquor to a minor were discovered by the licensee and disclosed to an appropriate law enforcement agency immediately upon discovery.

(2) The commission shall provide a procedure by which a licensee who is aggrieved by any penalty imposed under subsection (1) and any suspension or revocation of a license ordered by the commission, a commissioner, or a duly authorized agent of the commission may request a hearing for the purpose of presenting any facts or reasons to the commission as to why the penalty, suspension, or revocation should be modified or rescinded. Any such request shall be in writing and accompanied by a fee of $25.00. The commission, after reviewing the record made before a commissioner or a duly authorized agent of the commission, may allow or refuse to allow the hearing in accordance with the commission's rules. The right to a hearing provided in this subsection, however, shall not be interpreted by any court as curtailing, removing, or annulling the right of the commission to suspend or revoke licenses as provided for in this act. A licensee does not have a right of appeal from the final determination of the commission,

except by leave of the circuit court. Notice of the order of suspension or revocation of a license or of the assessment of a penalty, or both, shall be given in the manner prescribed by the commission. The suspension or revocation of a license or the assessment of a penalty, or both, by the commission or a duly authorized agent of the commission does not prohibit the institution of a criminal prosecution for a violation of this act. The institution of a criminal prosecution for a violation of this act or the acquittal or conviction of a person for a violation of this act does not prevent the suspension or revocation of a license or the assessment of a penalty, or both, by the commission. In a hearing for the suspension or revocation of a license issued under this act, proof that the defendant licensee or an agent or employee of the licensee demanded and was shown, before furnishing any alcoholic liquor to a minor, a motor vehicle operator or chauffeur license or a registration certificate issued by the federal selective service, or other bona fide documentary evidence of majority and identity of the person, may be offered as evidence in a defense to a proceeding for the suspension or revocation of a license issued under this act. A licensee who has reason to believe that a minor has used fraudulent identification to purchase alcoholic liquor in violation of section 703 shall file a police report concerning the violation with a local law enforcement agency and shall also present the alleged fraudulent identification to the local law enforcement agency at the time of filing the report if the identification is in the possession of the licensee. The commission may promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, regarding the utilization by licensees of equipment designed to detect altered or forged driver licenses, state identification cards, and other forms of identification.

(3) In addition to the hearing commissioners provided for in section 209, the chairperson of the commission may designate not more than 2 duly authorized agents to hear violation cases. A person appointed under this subsection shall be a member in good standing of the state bar of Michigan.



(4) A duly authorized agent who has been designated by the chairperson pursuant to subsection (3) shall have, in the hearing of violation cases, the same authority and responsibility as does a hearing commissioner under this act and the rules promulgated under this act.

(5) A duly authorized agent who has been designated by the chairperson pursuant to subsection (3) shall be ineligible for appointment to the commission for a period of 1 year after the person ceases to serve as a duly authorized agent.

**436.1909 Violation of act as misdemeanor; penalties; legislative intent.**

Sec. 909. (1) Except as otherwise provided in this act, a person, other than a person required to be licensed under this act, who violates this act is guilty of a misdemeanor.

(2) Except as otherwise provided in this act, a licensee who violates this act, or a rule or regulation promulgated under this act, is guilty of a misdemeanor punishable by imprisonment for not more than 6 months or a fine of not more than $500.00, or both.

(3) A person who performs any act for which a license is required under this act without first obtaining that license or who sells alcoholic liquor in a county that has prohibited the sale of alcoholic liquor under section 1107 is guilty of a felony punishable by imprisonment for not more than 1 year or by a fine of not more than $1,000.00, or both.

(4) It is the intent of the legislature that the court, in imposing punishment under this section, should discriminate between casual or slight violations and habitual sales of alcoholic liquor or attempts to commercialize violations of this act or the rules or regulations promulgated under this act.

**R 436.1515 Sale and delivery of alcoholic liquor.**

Rule 15. (1) An off-premise licensee who is licensed to sell beer and wine shall not take orders for the sale of beer or wine and have the delivery of the beer or wine made to the retail customer by a wholesaler, manufacturer of beer or wine, an outstate seller of beer or wine, or their licensed representatives or salesperson, without the prior written approval of the commission.

(2) An off-premise licensee who is licensed to sell spirits shall not knowingly allow the delivery of spirits to a retail customer by a licensed representative or salesperson, unless the licensed representative or salesperson is acting on behalf of the retail customer.

**R 436.1719 Requirements for sale of bottled wine.**

Rule 19. (1) Bottled wine shall not be offered for sale, kept for sale, sold, delivered, or otherwise introduced into this state unless all of the following provisions have been complied with:

(a) The wine is bottled, packaged, marked, branded, and labeled under these rules.

(b) The wine label truthfully describes the contents of the container in accordance with these rules and the federal wine regulations published in 27 C.F.R. part 4, subpart D, §§4.1 to 4.80, of 1935, as amended, which are adopted in these rules by reference. Copies of the adopted provisions may be obtained from the Superintendent of Documents, United States Government Printing Office, Washington, DC 20402. The cost at the time of adoption of these rules is $49.00. Copies of these provisions may also be obtained from the Liquor Control Commission, Department of Consumer and Industry Services, Secondary Complex, 7150 Harris Drive, P.O. Box 30005, Lansing, Michigan 48909, at a cost of $55.00 each.

(c) The wine has received a registration number of approval from the commission.

(2) The commission reserves the right to disapprove any wine label submitted for registration that is deemed to



promote violence, racism, sexism, intemperance or intoxication or to be detrimental to the health, safety, or welfare of the general public.

(3) Bottled wine shall not be shipped, delivered, or otherwise introduced into this state unless it is accompanied by an invoice, manifest, or other shipping document listing the quantity of bottled wine, by brand name and corresponding registration number of approval, that is being shipped, delivered, or introduced into this state.

(4) A manufacturer, rectifier, or outstate seller of wine who is responsible for labeling shall furnish proof, upon request, that valid certificates of approval for the label have been obtained from, and are unrevoked under, the federal labeling requirements as published in 27 C.F.R. part 4, subpart D, §§4.1 to 4.80, of 1935, as amended.

(5) A shipment of bottled wine from a manufacturer or an outstate seller of wine shall be made only to a licensed wholesaler at the address of the licensed premises, except upon written order of the commission.